UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al, Debtors. — CAUSE NO. 08-13555(JMP)

- x

In re

LEHMAN BROTHERS, INC., Debtor. — CAUSE NO. 08-01420(JMP)(SIPA)

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

November 14, 2012

10:02 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

ECRO: MATTHEW

HEARING re Notice of Final Applications of Retained Professionals for Final Allowance and Approval of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from September 15, 2008 to March 6, 2012 (ECF Nos. 31901)

HEARING re Plan Administrator's Cross-Motion to Compel Giants Stadium LLC to comply with Rule 2004 Subpoenas and Objection to Giants Stadium's Motion to Quash the Rule 2004 Subpoenas (ECF No. 31652)

HEARING re Motion to Quash a Subpoena filed by Bruce E. Clark on behalf of Giants Stadium LLC (ECF No. 31339)

HEARING re Amended Motion of Giants Stadium LLC for Leave to Conduct Discovery of the Debtors Pursuant to Federal Rule of Bankruptcy Procedure 2004 (ECF No. 31105)

SIPA PROCEDURES

HEARING re Motion Pursuant to Federal Rule of Bankruptcy Procedure 9019 for Entry of an Order Approving Settlement Agreement Between the Trustee and Lehman Brothers Finance AG, in Liquidation (a/k/a Lehman Brothers Finance SA, in Liquidation)(LBI ECF No. 5362)

HEARING re Trustee's Motion Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rules 3007 and 9019(b) for Approval of General Creditor Claim (I) Objections Procedures and (II) Settlement Procedures (LBI ECF No. 5392)

HEARING re Debtor's Three Hundred Fifty-Seventh Omnibus Objection to Claims (Misclassified Claims (ECF No. 31048)

HEARING re Objection to Claim No. 17763 Filed by Laurel Cove Development, LLC (ECF No. 29187)

HEARING re Three Hundred Twentieth Omnibus Objection to Claims (No Liability Rose Ranch LLC Claims)(ECF No. 29292)

HEARING re Debtor's Three Hundred Twenty-Ninth Omnibus Objection to Claims (Misclassified Claims)(ECF No. 29324)

HEARING re Motion for an Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing and Approving the Settlement with Lehman Brothers, Inc. (ECF No. 43)

HEARING re Turnberry Centra Sub, LLC et al v Lehman Brothers Holdings, Inc., et al (Adversary Case No. 09-01062)

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MS. MARCUS: Good morning, Your Honor, Jacqueline Marcus from Weil Gotshal and Manges on behalf of Lehman Brothers Holdings, Inc. as plan administrator.

We're here this morning, Your Honor, for the fifty-fifth omnibus hearing, as well as the rescheduled claims hearing that had previously been scheduled for October 31. We're glad that the courthouse has reopened, and that things are starting to get back to normal.

The first item on the agenda, Your Honor, is the fee hearing related to uncontested fee applications. Mr. Gitlin will be handling that on behalf of the fee committee.

THE COURT: Fine. Mr. Gitlin, good morning.

MR. GITLIN: Good morning, Your Honor. Richard Gitlin, chairman of the fee committee.

Your Honor, I'm very pleased to report to the Court that the fee committee has reached a consensual agreement with 25 of the 47 professionals, which is outlined in the report that we submitted to the Court.

I would like to comment on the professionals, both their work and their activity in working with the fee committee, Your Honor. This has been an extraordinary effort on behalf of the professionals and the Court to make this happen in three years, as successfully as it has been

done.

And the professionals are to be complimented for that. But they're also to be complimented for the civility and attention they gave to the fee committee, as the fee committee raised issues and issues that had to be resolved. And I will say these 25 professionals in all acted in that fashion, and they should be commended for that, Your Honor.

So I would respectfully request Your Honor to approve the 25 uncontested professional final fee applications. I would mention that the remaining 22 are scheduled for November 29th. We are in conversation with all them. We do have some sticky issues, we're still dealing with, but we are hopeful that we'll be able to come before the Court on the 29th with similar consensual agreements. Thank you.

THE COURT: Thank you, Mr. Gitlin, and I'm hopeful that you're successful with the remaining 22 myself.

I'd like to make a couple of comments. First of all, all of the 25 applications that are the subject of the committee's report are approved, with the adjustments reflected in the schedule to your report. I also wanted to say I found the committee's report to be remarkably well prepared, nuanced in its treatment of the issues that were addressed by the committee, and a model of the kind of work that fee committees or fee examiners as they're sometimes

identified to be, can do in all significant cases. It's a superb precedent, and I commend you and your counsel in preparing it.

Additionally, a true public service has been done here by members of the committee in making the fee application process in the largest bankruptcy case in history one that even through today has been consensual and without public controversy. That is a particularly remarkable accomplishment in consideration not only of the size of the case, but the aggregate fee awards themselves.

Business publications including the Wall Street Journal routinely have written about the burn rate in the case and the aggregate fees in the case. I think your report very appropriately puts those expenses in context, compliments the professionals for their good work, but also compliments them for their flexibility and integrity in dealing with the fee review process.

One of the more telling comments made in the report is that the approximately $1.8 billion in approved cumulative professional fees in the cases represents, and I haven't done the math, but I accept what you said, approximately three percent of distributions to unsecured creditors. In effect, the fees in this case represent on a percentage basis a result that would be admirable in virtually any bankruptcy case.

Under the circumstances, I am not only pleased to approve the 25 applications that are the subject of today's hearing, but to compliment you and the other members of the fee committee for doing truly extraordinary work that benefitted the Court, benefitted the professionals, but also served the public interest in demonstrating that the professionals in the case were held accountable, but were held accountable in a manner that was sensitive to the needs of the case, and to the issues that have been identified in your report, which I commend you on again.

MR. GITLIN: Well, Your Honor, thank you very much for your comments. But I must say that the report is a reflection of the quality of the work that counsel has provided in this case. Godfrey and Kahn has been the machinery behind the ability to deal effectively with these fees, and the draftsmen of that report. So I must extend your compliments more to them, Your Honor, but I very much appreciate your comments, Your Honor.

THE COURT: Anyone who had a hand in drafting the report deserves praise.

MR. GITLIN: Thank you, Your Honor.

THE COURT: All right, fine.

MR. KORNBERG: Your Honor, Alan Kornberg of Paul Weiss Rifkin and Garrison for Houlihan Lokey. We have one technical issue with respect to Houlihan's final fee

application, which is the subject of the fee examiner's report.

Your Honor may recall that the deferred fees paid to Houlihan are paid as and when distributions are made to general unsecured creditors. As we mentioned in our final fee application, there need to be a procedure for payment of those, and we have a form of order that we circulated, and I believe is acceptable to the parties, that provides -- there don't have to be further Court orders to approve those fees when they're paid, as to when the distributions are made, but there is a process by which Houlihan will send a fee statement, the debtor, the U.S. Trustee, counsel for the committee will have 30 days to verify that's correct. If there's a problem, we can talk about it. If we can't resolve it, we would then come back to the Court.

So we have a very simple form of order that provides for that mechanism with respect to the deferred fees.

THE COURT: Okay.

MR. KORNBERG: And I'd like to submit that to Your Honor.

THE COURT: That's fine. Has that order been reviewed by everyone who needs to see it and comment upon it?

MR. KORNBERG: It has been reviewed by folks in

your office.

MS. MARCUS: That was my question.

MR. KORNBERG: And the fee committee and the U.S. Trustee, and I believe -- okay, so we'll show it to Malank (ph) and then submit it, Your Honor.

THE COURT: Okay, fine. I just -- since you mentioned the U.S. Trustee, I just would like to note something on the record. We received a telephone call this morning from Andrea Schwartz, who would have been here today, but apparently suffered an accident on the way to work in the subway, and has been taken to the hospital.

We believe this is not serious, but she wanted us to know that her absence should not be viewed as an indication that the U.S. Trustee did not take very seriously the matters that were before the Court with respect to professional fees. I understand that Susan Golden from her office is participating by telephone, just in case --

MS. GOLDEN: Good morning, Your Honor. This is Susan Golden, I literally just dialed in and heard the last part of what you just said.

THE COURT: You missed the best part of the hearing. I just wanted to note that the comments that I made with respect to the fee committee certainly apply to the role of the U.S. Trustee as a member of that committee. And we hope that Andrea Schwartz has not been seriously hurt

and will be back in court soon.

MS. GOLDEN: To our knowledge, you know, she just has a minor injury, but she'll be okay.

THE COURT: Okay.

MS. GOLDEN: Thank you for inquiring.

THE COURT: All right. And then as far as the Houlihan Lokey order is concerned, which became an opportunity for that digression, it will be entered as an agreed order.

MR. KORNBERG: Thank you, Your Honor.

MR. GITLIN: Thank you, Your Honor.

THE COURT: And everyone who wishes to be excused in connection with the fee issues that were just presented may do so.

(Pause)

MS. MARCUS: Your Honor, the first group of contested matters on the agenda relates to the plan administrator's disputes with Giants Stadium. My partner, Richard Slack will be handling those matters.

THE COURT: Okay. Let's wait for other counsel to assemble.

MR. SLACK: Thank you, Your Honor.

THE COURT: Good morning. Before we get into the argument with respect to this discovery dispute, I'll take appearances, and I'm also going to ask some questions that I

would like you to focus on in your presentation.

MR. SLACK: Okay. So, Your Honor, Richard Slack from Weil Gotshal on behalf of the plan administrator and Lehman.

MR. CLARK: Good morning, Your Honor, Bruce Clark from Sullivan and Cromwell for Giants Stadium. With me is my colleague Thomas Wright.

MR. WRIGHT: Good morning, Your Honor.

THE COURT: Good morning. Okay. It's my recollection and the recollection has been reinforced by reviewing the papers that we last had a discovery argument in connection with 2004 discovery in September of last year, approximately 14 months ago.

The papers that I have read provide different perspectives of what has occurred over the last 14 months. But to me one of the revelations is that the claim originally held by Giants Stadium is now held by an entity affiliated with Baupost called Goal Line, and that an intermediate transferee was Bank of America.

To me this is a result of -- as a result of this revelation to me this becomes one of the first examples presented to me in this case, although I'm sure there are many others that are invisible to me, of the phenomenon discussed by scholars as the so-called empty creditor.

The creditor that appears to have real party in

interest status in a bankruptcy case, but who has actually divested itself of all or substantially all of the economics associated with that creditor interest, and it may have other disguised interests that impact that creditor's motivation within the bankruptcy case.

Henry (indiscernible) a professor of law at the University of Texas, who for a time had a senior position with the SEC has written extensively on this subject. And I am personally not only familiar with it, but interested in it. I bring this up because one of my real concerns here is that the papers disclose apparently heroic good faith efforts to settle disputes between Giants Stadium on the one hand, and Lehman on the other, but uncharacteristically this is one of the few cases presented to me at least on the current docket, I don't know what next year will bring, in which parties that have sincerely attempted to resolve their differences have failed in those efforts.

As I understand it, a mediator who is one of the mediators quite skilled in dealing with derivative disputes in the Lehman case participated in at least a one day mediation session, and that that session ended with no agreement, and that thereafter at some point, the parties endeavored to try to restart discussions. And the current flap, if I can call it that, with respect to discovery is a manifestation of the ongoing antagonism between the parties.

To me, at least, the discovery dispute represents deflected antagonism and is subtext for what is really the ongoing unresolved business issues among the parties.

I will note the obvious, this Court and every other Court in the nation despises discovery disputes that cannot be rationally resolved by experienced counsel, and here we have experienced and skilled counsel on both sides. The papers are voluminous and include declarations, references to the transcript from September of last year, and involve a level of effort that to me seems disproportionate to the issues that are in dispute.

And so I have the following questions. First, what is the explanation for the increase in the purported claim amount from $301 million to $585 million? How did that happen, what's the justification for it, and has that been the subject of negotiations between the parties?

Secondly, who is Lehman negotiating with when it negotiates? Are you negotiating with counsel for Giants Stadium or counsel for Goal Line?

Third, why is historical counsel for Giants Stadium still here purporting to act on behalf of an historical creditor when, in fact, the real economics in whole or in part, are elsewhere? To what extent does this represent independent judgment of Sullivan and Cromwell's client and to what extent does it represent Sullivan and Cromwell, and

I hate to use the term, as a puppet for other parties that are driving this bus?

Those are my questions, and I want them answered before we get into the merits of the discovery dispute, which as I said, appears to me to be largely a strategyn chosen by both sides to get into court. I don't view it as a real dispute. I know you do, and you're going to have to justify to me why this isn't one of the biggest wastes of time since this case began.

MR. SLACK: So, Your Honor, starting right with the questions that you've asked. I think it's fair to say that the debtor that Lehman thinks that the claim amount that was essentially doubled was done purely for negotiating purposes. In other words, only after this Court back in September sent us back to mediate or essentially to try to resolve it, the claim essentially doubled.

We haven't had a stitch of discovery on who made that decision, why it was doubled, what the justification is. Obviously, they gave us a piece of paper, but unlike the original 301 million, we haven't had any discovery whatsoever under 2004 about that.

In terms of whether those matters were the subject of negotiation, let me put it this way. Obviously the parties had discussion over the amount of the claim, and there was discussion about the amounts of the claim. I

don't think it's fair to say, however, that the debtor has insight as to why it was done, what's the timing of it, what the basis of it is. We haven't had insight into any of that.

THE COURT: Well, let me just ask you a question, and I don't want to know anything about the substance of the negotiations that took place between the parties. But isn't the first question that somebody sitting down to the negotiating table would ask given this fact pattern, how on earth can you justify an increase from $301 million to $585 million, what's that about? Isn't that the first question? Perhaps not expressed in that way, but I think there would be an element of huge exasperation built in the question.

MR. SLACK: There is that exasperation, and I'm sure those were the subject of discussions, and again, there was a piece of paper that's filed. There is an amended claim that was filed. So, I mean, to the extent that there's an amended claim, we could look at it and say here's what's in it. But in terms of why it was done, who made that decision, why didn't their original financial advisor, Goldman, reach that amount, you know, two and a half years earlier.

Again, we haven't had any kind of insight into any of those kinds of questions, and those have not been answered. And, of course, that's one of the reasons that we

wanted to continue the investigation. So that's, I think, at least from our perspective, you may get another perspective the answer to number one.

In terms of number two, at some point we were informed once Baupost, Goal Line acquired the interest that Sullivan and Cromwell was going to jointly represent Giants Stadium and Goal Line. And so there have been representatives, you know, Sullivan and Cromwell's been involved, Baupost has been involved, and representatives from Giants Stadium have been involved in the negotiations throughout this period.

Now, that's not to say that every conversation included representatives of all, but all parties at some level have been involved in negotiations over the past year.

And I think that's -- I think that that somewhat answers at least what we know about question three, which is why is Sullivan and Cromwell still representing Giants. My understanding again is that they're jointly representing Giants and Baupost and Goal Line in connection with this.

What I can say is again, we haven't had any discovery into that sale. We haven't seen the actual transfer papers between Baupost, and I guess it's Bank of America. We did see the original papers between Giants and Bank of America. That's one of the things we asked for again in our two thousand and --

THE COURT: Why is that even relevant at this point?

MR. SLACK: The only thing that potentially is relevant is exactly I think the questions that you're asking. We need to understand when we're talking to somebody, for example, who is the interest. Who should we be talking to Baupost or not. And that was part of it.

The other thing is, Baupost and Giants Stadium were on opposite sides of that deal. I think we were entitled to see what was disclosed during those negotiations, and we've asked to see that. And we -- they're not privileged, and we should have access to it.

THE COURT: Well, whether you should or should not have access to it, I'm just going to make the general observation that ordinarily when claims are transferred and the Lehman case has been one of the largest unregulated trading markets and distressed claims in the world during the past four years. There's a routine that I'm familiar with not from being a Judge, but having been a practitioner, and you're not likely to find very much of value in the back and forth relating to that claim tread, at least as it relates to the value for purposes of any objection you might file.

These are trades between so-called big boys, and everybody makes their own judgments as to the likelihood of

success in future litigation with regard to the claim. You may or may not be ultimately entitled to obtain that information, but even if you do, in my view, it's a big so what.

MR. SLACK: Might be. Look, you know, what you're saying obviously from experience makes sense. What I would say, Your Honor, is that this is a little bit unlike other claims, in that it's obviously a very large one. It's obviously unliquidated. It's obviously the main issues that somebody looking to buy it are going to be asking themselves are, at the end of the day, is it a receivable or is it a payable, and if so, how much.

So I think, you know, it's a little bit different than, you know, a claims market with liquidated claims. But, you know, that's just the tiniest piece of what, you know, we were seeking in our 2004.

So, Your Honor, would you like to hear the answers to those questions from counsel, or would you like me to go ahead with my argument? I mean --

THE COURT: I'd like to hear what counsel for Giants Stadium has to say about the big picture questions that I raised. And one of the reasons why I'm focused on this is that I am concerned about more than the discovery dispute that has been presented to me, I'm frankly concerned as to why we're having the dispute at all, and why this

claim is different from other claims, so many of which have already found their way into formal claims objections.

And I'm interested in that question, but before getting to it, Mr. Slack, I'd like to hear comments from --

MR. SLACK: Okay.

THE COURT: -- counsel for Giants Stadium as to some of the preliminary questions that I asked.

MR. SLACK: Sure.

MR. CLARK: Thank you, Your Honor. Again, Bruce Clark for Giants Stadium.

Trying to take your questions in order, as to the increase in the amount of the claim, when the claim was originally filed, it was filed with five, I believe there were five caveats as to items that have yet to be quantified. And when the claim was revised at least two of those items were the cause of the increase from 301 to 585 million.

One of them reflects the amount of a capital charge, which the person stepping into the shoes of Lehman, in our view, would've had to incur, in order to protect themselves by way of reserves against the likelihood of a further default. And the other was a difference in the credit charge. That difference came about because the original deal with Lehman involved raps by insurance companies, either Figik (ph) or FSA, both of whom at the

time of the transaction reviewed were rated as AAA credits in the market. And at the time of the putting out of the proof of claim, the amended proof of claim, we quantified an additional amount because those protections were gone. And the amount that one would have to pay to get the equivalent protection was greatly increased.

And I am not, I've got to say, I'm not trying to duck this, but I am not the person who has studied this in the last month and really can give you a better answer. But that's my understanding of the two principal reasons that the amount was increased between the first claim and the second claim.

THE COURT: Okay.

MR. CLARK: As to --

THE COURT: Has that information which you just shared with me previously been shared with Lehman when --

MR. CLARK: Yes.

THE COURT: Okay.

MR. CLARK: I mean, as Mr. Slack said, it's in the -- a description of that much is in the amended proof of claim, and neither Weil nor we particularly want to go -- and should go into the specifics of the conversations. But the conversations during the settlement talks centered on this and a lot of other points.

I don't know if the question you asked why did you

increase the 301 to 585 was the first question that came up. But it certainly was a question that was explored.

THE COURT: Assumingly if I were on the receiving end of a claim like that, even if we were talking about hundreds of dollars instead of millions of dollars, the first question I would ask, how on earth could you be claiming that much more.

MR. CLARK: I think --

THE COURT: How did this claim double?

MR. CLARK: I think you're being more courteous than the words I heard when the question was asked.

THE COURT: Okay. Well then --

MR. CLARK: And clearly that was asked.

THE COURT: Well, I'm in court so I have to be courteous.

MR. CLARK: Right. But that -- I mean, my best recollection is that was discussed. As Mr. Slack said, a lot of the conversations in these settlement talks took place with different people from the interested parties at different times, and neither of us was party to all of them by any means.

THE COURT: Okay.

MR. CLARK: I'd be astonished if that was not talked at length.

Second, who was Lehman negotiating with, I agree

with what Mr. Slack said. I think I just said the same thing, but they were negotiating with people from Sullivan and Cromwell. We are representing both Baupost and Giants Stadium. They were all negotiating with people from Baupost at the same time, and Giants Stadium people as well. And there were a variety of people on the Lehman side. I mean, there must have been 20 that I met at one time or another.

So it was a very active negotiation or series of negotiations over that time period.

THE COURT: One of my fundamental questions is whether Giants Stadium has continuing economic interest in this claim or is a so-called empty creditor. Is it an empty creditor?

MR. CLARK: No, it's not. The reason it's not is because the sale papers between Giants Stadium and Bank of America which the debtors do have, and which they did ask questions about in the deposition, make it clear that Giants Stadium has a contingent interest in the result of the negotiation or resolution of the claim. It depends on how much is paid or how much is not paid. They do have a material interest one way or another.

THE COURT: So as a kicker?

MR. CLARK: It's either a kicker or a pay back or a clawback, one or the other.

THE COURT: Okay.

MR. CLARK: Okay. As to the question that came up about the sale between Bank of America and Baupost, my information on that is that Giants Stadium was not involved in that. That was a transaction between Bank of America and Baupost. They negotiated it. And I don't believe we have anything certainly anything material to either produce or to disclose about it. That is not a transaction that to my knowledge, I just heard Mr. Slack say, they have information about, but neither do we.

THE COURT: All right.

MR. CLARK: Have I addressed the preliminary questions? I thought I took the list down right.

THE COURT: I think you have, although Mr. Slack seems to want to interject at this point. Do you want to proceed with your main argument?

MR. SLACK: Yeah, please, thank you, Your Honor.

THE COURT: And understand there is this other question which in effect wraps all the other questions. Why are we here with a discovery dispute as to a claim, that's whether it's $301 million claim or a $585 million claim appears at least in the Court's view to be more or less indistinguishable from any number of other derivative type claims in this bankruptcy case, and in effect, is a righted question, are you gentlemen both serious about this dispute?

So much has gone into a 2004 examination request

and resisting that request and efforts to make it reciprocal, that it raises more questions in the Court's mind than it answers as to what's going on here. Now, I want to know what's going on here.

MR. SLACK: Well, Your Honor, as I think you know from the docket, the debtor has taken 2004 discovery with respect to, you know, hundreds of counterparty, derivative counterparties and we haven't had these issues. I mean, if you think about the number of years that I've been before you on matters, if we've had a couple of discovery disputes, that's a lot.

And so I think we have a record frankly of these kinds of situations, and this just hasn't gone the way of the other ones. Because we have frankly been obstructed, and we have a -- you know, we had a situation a year ago, and that -- what happened a year ago in September is we had another discovery dispute, and unfortunately, we had -- you know, we listened to the Court tell us that frankly you didn't like that discovery dispute.

THE COURT: I'll be very consistent. I'm not likely to like any discovery dispute that you present to me.

MR. SLACK: But what happened in that hearing is important for today. What happened in that hearing which concerned a motion to compel Giants Stadium with respect to privilege is Giants Stadium said, Your Honor, they won't

talk to us about the merits. They won't sit down with us and talk. And I said, Your Honor, I was concerned. And my concern was, we were in the middle of an investigation that we had not finished, and we needed a little more time to get it done, as long as we had cooperation.

And I said I didn't want a gotcha. I didn't want to sit down in negotiations, talk about our preliminary views of the merits, and then have, and be faced with the argument that Giants Stadium says, well, obviously you know the merits, you've had discussions with us on the merits, you don't need anymore 2004 discovery. And I sought a commitment from Giants that we wouldn't be faced with that argument.

And the Court responded as follows, says, "You don't even need that commitment because I'm going to give you a gotcha from the bench, a no gotcha. If you choose to have a conversation that could lead to some kind of productive business-like resolution to this, doing that will not constitute a waiver of any of your discovery rights or your rights to continue with your investigation as you see fit."

Now, I'd point out that at that time when the Court gave us the assurance that, yes, we could enter into the negotiations, so to speak, talk about the merits even though we hadn't finished, that we weren't going to be faced with

exactly the argument we're being faced with today. Giants Stadium stayed silent. They didn't raise their hand and say, Your Honor, you can't do that, they're not entitled to any discovery. They didn't say any of that. They stayed silent.

THE COURT: Well, I understand what happened. I actually remember it and my memory was further refreshed by looking at the transcript. And I know that there's a point that you've emphasized in your papers, and you're emphasizing it again now.

But it's 14 months later. You've had some further discovery, and you've had further business discussions, and you've had a mediation session. Without going into the substance of what was discussed in the various sessions, it appears to me at least, that inevitably there has been a sharing of information in positions by the parties, or there could not have been open and good faith negotiations.

So today, almost Thanksgiving 2012, you must know much more about the claims and the defenses to those claims than you knew 14 months ago. It just seems to me impossible that you are in effectively the same position today that you were then.

So that's one concern I have relative to your position. Another that I have is that Giants Stadium argues in effect without using this hackneyed expression, what's

sauce for the goose is sauce for the gander. If there's going to be discovery at this stage of the game, it should be reciprocal. We shouldn't just be turning over 64,000 pages if that's the right number of discovery only to be asked for more. When does this "investigation" come to an end? Is it serious? Is it real? And why are you not simply doing what you've done in other settings, file an objection? We'll have a contested matter, we'll have reciprocal discovery, and the 2004 discovery that we're arguing about is rendered moot.

MR. SLACK: Well, there's a couple of pieces that I want to answer first. We haven't had any other discovery in the last year. Since that hearing, there has been no discovery. Now, there has been discussions, but I can tell you that we have not had a stitch of additional discovery or information in our investigation.

Our investigation has been frozen by both agreement and by the Court effectively during that 14 months. And --

THE COURT: Let me interject and say that when -- you're using the term discovery, I think you're using it as a term of art. When I use the term discovery, I think I have a broader sense of the term in mind.

Necessarily, you must be learning more than you knew before simply by virtue of participating in discussions, information is being shared. Otherwise, you're

not having good faith negotiations. Is it just pointless posturing, or is there in fact some meaningful exchange of information?

MR. SLACK: I don't believe that -- and I'm not going to try to, you know, parse through, but I can tell you this. I think the parties have had a number of intense discussions on position. I don't believe there's been a further exchange of what I would call information, underlying information about the matters that we want to investigate.

And so, yes, there have been a number of exchanges of position. I don't want to -- I don't think it's appropriate to go into that, but there hasn't been -- you know, there hasn't been a sharing of additional information. Effectively the investigation froze, and we said we would have discussions with them on the merits based on what we knew. And I have to tell Your Honor, what happened here is exactly what I was worried would happen. And that is, we would engage in good faith discussions on the merits, and then be faced with an argument that said, okay, now you can't have 2004 discovery to finish your investigation.

And I -- and that's compounded, Your Honor, because not only did we get the Court's assurances, but Giants Stadium actually made an agreement with us. In other words, you know, Baupost and Giants Stadium when they were

negotiating with us after the failed mediation we wanted to continue our investigation then. And they said, if you engage in these principal to principal negotiations at that point, we're not going to hold it against you. We actually had a written agreement. It's Exhibit H to the Firestone declaration.

And the agreement was, it says, Lehman's "willingness to enter into settlement discussions does not constitute any waiver of our rights and is without prejudice to our ability to complete our investigation under Bankruptcy Rule 2004."

I'm really at a loss, Your Honor, to understand how the position that they're taking today isn't a direct breach of that agreement, and frankly, the assurances that we received from the Court should allow us to continue our investigation as we see fit, because it hasn't continued at all since then.

And, you know, and the question of when it's going to end, if we had three to four months of cooperation from Giants Stadium and the third parties, I think we would get -- you know, we would get there. We haven't had that cooperation, and it -- you know, all I can tell you is that there are areas that we've laid out in our papers, and I'm happy to go through, but there are areas that we still need, you know, to investigate. We said we wanted to investigate

them back in September of 2011, and we wanted to complete it then. But it was based on the assurances from the Court, based on the agreement from Giants Stadium that we actually went forward with the discussions.

THE COURT: Mr. Slack, let's circle back and revisit particularly assurances from the Court that I recall giving. I'm not breaching any commitment made to you. The commitment related to a term that doesn't have legal significance. It's gotcha. The idea was that participating in settlement discussions would not be cause for you to end up with forfeited rights of discovery.

I can say that for myself I never expected to be talking about this with you more than a year later. And one of the things that to me appears to be a changed circumstance, and we can discuss whether it changes any outcomes, is that at least from the perspective of Giants Stadium, there is the protection that this 2004 investigation is more tactical than real, and that you really have at a business level already determined that you're objecting to the claim. So that you don't need the further investigation to make a judgment as to whether this is a claim you're going to say yes to. You already know you're saying no to it.

Given that setting, I think things may have changed.

MR. SLACK: Well, I have to tell you I don't think they've changed one bit, and I don't agree with that at all. And I -- I'm usually not so blunt with this Court, and I've appeared many times in front of it.

THE COURT: Well then you're getting used to it.

MR. SLACK: The fact is, is that we have exactly the same information that we had back when we started in September of 2011. And what I was worried about was somebody taking exactly the tact that Giants Stadium said, and frankly that Your Honor just took, which is that if we -- you know, obviously our discussions on the merits had to include discussing preliminary views. And what I was worried about is if we had discussions and we talked about those views based on a partial investigation that someone would say there's changed circumstances.

And the truth is, Your Honor, that's a gotcha, because what we should've said is, Your Honor, then we'll finish our investigation and then we'll talk. Because there are still critical areas that we haven't had the slightest stich of information because we talked for example, we didn't take any information from the NFL.

Now, we have a subpoena outstanding to the NFL, that's been frozen as well per agreement, and they've agreed to produce documents now. There's Goldman Sachs. Goldman Sachs did all of this work on the valuation, and again

that's been frozen while we've been in discussions. There's insurers. The insurers here which insured the underlying option rate securities, they had certain consent rights, and they were actually -- there are e-mails and communications with them, significant ones during the time frame of the termination. And again, we have a subpoena outstanding with respect to that, and it's waiting this.

We haven't taken any discovery with respect to, and as I mentioned before, the amended claim as to exactly when that was made, and what the basis of that is. And there are serious issues with respect to one whether that claim should be allowed to be amended at all, and then what it is.

So there are significant issues. And again what I'm concerned about here is that nothing has changed from September of 2011 except that we engaged in real and hopefully good faith discussions, where we did discuss our preliminary views of the merits. And based on those preliminary views, and that's the only thing that's happening, that's the only thing that's different, and that's the only thing that's changed. We are now faced with we're not allowed to finish our investigation.

And I can tell you this, this is not tactical. This is not tactical. This is real. We need the information, and this is information we sought and wanted in September of 2011 before the discussions. It's not like it

was, you know, heaped on now. They knew we wanted this information. It's not tactical. And other parties have allowed us to take this kind of 2004, and we haven't had the disputes. They've cooperated, it's gone quickly. And this would go quickly if we had cooperation from Giants Stadium and the third parties.

With respect to the -- you know, Giants Stadium's motion to take 2004 --

THE COURT: Before we get to that, let me ask you one more question. In what respect, if at all, would Lehman be prejudiced if you simply objected to the claim now, based upon what you know, and proceeded to take discovery in a contested matter, everything presumably that would be the subject of the 2004 request would simply be the subject of ordinary course discovery in that contested matter?

MR. SLACK: What I can tell you is there has not yet been a determination, that's one of the reasons that this is a very complex, and I can tell you this, Your Honor, honestly, that there has not yet been a determination by the estate whether we are going to press that this is a receivable to the estate or a payable.

There are very interesting issues. I'm happy to go into what they are. But in that sense, this is very unlike most of the claims, because in many of the claims, and in many of the swap cases, we know it's either going to be a

receivable and a payable. And because of some of the issues here, which are very complex, the estate has not yet made a determination whether to press this as a receivable, and actually bring this as an affirmative claim, or whether simply to treat it as an objection to a claim. And if we object to the claim, again, what I can tell you honestly is why we have preliminary views, there has been no determination yet as a final matter, as what grounds we are going to take, because again, there are many different layers of this onion.

And I would say the following, Your Honor. It may be that somebody comes in and files a claim, and you've probably seen this in your career. They file an outrageous claim, you know, they've got something that's $10 billion they put in a claim. Well, it may very well be that the debtor knows it's not going to pay $10 billion, and it's going to quote object to the claim.

I don't believe that cuts off 2004 discovery to figure out and understand the bases for that claim, and to figure out the bases for the objection. And so whether or not the estate -- you know, I can tell you this, the 600 million that they've put in their amended proof of claim is more than the face amount of the underlying notes that were being hedged.

So essentially they're taking the position that

they deserve in unwinding the hedge more than the underlying face amount of the notes. Now, I can tell Your Honor that sounds to me facially unreasonable. But that doesn't mean that just because somebody files this wild claim and you're going to say, hey, I know I'm not agreeing to 10 billion, it doesn't mean you can't go and take 2004 discovery.

And the analogy on the other side, Your Honor, I think is striking. What 2004 allows you to do when you're filing an affirmative claim is to understand the bases for it. It's not just enough to say, hey, I think at the end of the day I'm going to file, you're allowed to go and investigate, so you know the bases of your claim, so you could actually bring a Rule 11 type claim on the affirmative side. Well, it works the same way on the claims side.

So I don't think the question here is are we likely to object to, you know, the 600 million in claims. I think there's a really serious issue here as to whether this is a receivable and a payable, and if so, what are the bases, and I can tell Your Honor, there is no definitive view on that. And we need to investigate in order to figure out whether we're going to bring this as an adversary proceeding or we're just going to object to the claim.

THE COURT: Okay.

MR. SLACK: I'm happy to talk about now the 2004 discovery. I think I can be a little briefer. Obviously I

was asking some questions from the Court, and do this all at once rather than --

THE COURT: I'm treating this as one matter because it has multiple parts.

MR. SLACK: Let me then speak to the Giant's motion to take 2004.

So what the Giants has essentially done has said, because we, the debtor, want to take more discovery, they'd like to take some discovery. And the difference, of course, is once they've filed the claim, the debtor here can make two decisions. We could say, we agree with some or all of that claim, and if we do that, much of the discovery that they're going to seek could very well be premature and frankly ultimately useless.

And so what makes sense here is to let us finish our investigation, figure out are we bringing this as an adversary proceeding, are we going to object to the claim, and if so, on what bases. And then that will actually shape the kind of discovery that ultimately if we're going to object to it, that Giants Stadium will be able to get. If you allow it now, you have a potentially wasteful and unnecessary set of discovery that's unneeded.

Second, Giants Stadium is really unable to swear, it never tries. Its own argument that it makes in opposition to our 2004 with their request to take it, and of

course, we're in different situations. They actually cite a case, GHR Energy Corp for the proposition that a party may not use 2004 after it has determined to pursue a claim. And, of course, it has filed claims. And what's -- they never try to square these positions. They never try to square the idea that they are in a situation, because of course, they do have all the information. They never try to square the

-- you know, that they have filed the claim, its detail.

And so under their own case law and authority, they're simply not entitled to get any at this point.

Third, even if it wasn't, you know, facially deficient, their request for 2004, as a matter of, you know, policy, this Court shouldn't allow it. And that's because there is a claims process when people file claims. And this happens, I assume, you see it much more than I do, is people file claims, and yes, debtors take 2004 discovery. And at some point, debtors will object to those claims or not. And if they object, there's a full process, sometimes outlined by the Court, sometimes not, to take discovery. And that's what should happen here.

And what Giants Stadium has essentially argued is that they should jump that process, that the process that applies to everybody else's claims shouldn't apply to theirs. And they even make, I think the incredible argument

that creditors are actually permitted to take 2004 discovery after filing claims to bolster those claims. Well, think about that as a precedent for your cases.

If that were the case, you would expect to see I think a number of cases where creditors do this all the time. I can tell you that if that were the law, I'd think we have hundreds if not more creditors in this case trying to seek discovery on their claims.

And Giants states two cases that I do want to discuss because we haven't had a chance to do that in any kind of reply for that idea. The first is a Drexel Burnham (ph) case back in 1991. That's a case that my colleague, Peter Grunberger (ph) participated in. And in the Drexel matter, one of the major creditors in that case was the FDIC and there were also creditor's committees.

Well, at least one of those committees was taking 2004 pursuant to a stipulation. And what the FDIC wanted, which was a major creditor in Drexel, was it wanted access to the discovery that was being done by the creditor's committees on other issues.

And what the Court said is the FDIC because it was such a major creditor could have that discovery even if it would bolster its claim. But what didn't happen in that case is what Giants Stadium wants here, is that the FDIC was allowed to put forth its own 2004 discovery on its claims.

That never happened. What they want here did not happen in the Drexel case at all.

The other case cited by Giants Stadium is a Texaco case, another case that Weil appeared in, in which Texaco's largest judgment creditor, Pennzoil sought 2004 discovery, again relating to issues in the case because it was the largest judgment creditor in Texaco.

And there was no request to take discovery concerning a filed claim, because remember it was a judgment creditor, it'd actually gone to trial on its claim. And that claim was not the subject of 2004 discovery.

So, you know, I think Giants Stadium is just simply not correct on the law, that once you filed the claim as a creditor, you can take 2004 discovery on that claim. Certainly we see creditors in cases and creditor's committees taking discovery, let's say there's third party claims out there, the debtor's not pursuing, you certainly see that kind of discovery. But what you don't see is 2004 discovery allowed on particular claims filed by those creditors. And there's no case that they cite where that's the case.

And again, if that was the case, it would really blow up the claims process in a case like --

THE COURT: Let me ask you this question, which doesn't relate to precedent that may or may not be directly

relevant or instructive to the current dispute. And instead to focus on the current dispute.

You have acknowledged in your argument that the underlying facts here are unusually complicated, and that your own client, which is certainly as sophisticated as any counter party has not yet concluded whether there is an affirmative claim here or a defense of claim if there are any defenses, for that matter.

Although at the preliminary matter, you've acknowledged that given the change from 301 million to 585 million it is highly probable that some objection will be made because you compared it with what might be called a preposterously large claim.

But given the complexities that you have acknowledged that underlie an analysis of claims and defenses, is this not a somewhat exceptional circumstance in which the typical discovery may be appropriate, and may not lead to the adverse consequences that you've described of hundreds of creditors coming in to seek what they're really not entitled to discovery with respect to their claim?

MR. SLACK: You'd only see it if you granted it. I think that the -- I think that you're likely --

THE COURT: Well, I'm asking the question intending to probe some of the issues here.

MR. SLACK: No. And I think it's -- I think you

would end up frankly being in the same situation as many other creditors, because every creditor is going to say, they're not going to know the facts, the underlying facts of Giants Stadium, they're going to say, Your Honor, we have a complex derivative.

What I can tell you is this, is that the information that we need or the information that's really relevant to the determination is all on their side. Their discovery is purely harassment. In other words, what they want from us is purely just a harassing set of discovery. They have told us so many times, even in their papers, they don't like one-sided discovery. And that has stuck in their crawl. And so what they're trying to do is purely as a harassing matter.

Think about what they did in this motion and I think you can understand that they don't need a stitch of discovery. They filed this motion 18 months ago, and they have adjourned it for 18 months in a row. And it wasn't until the settlement discussions ended and we pressed our continuation of the investigation that all of a sudden they say, oh, we need discovery. And that's because the sole purpose of it is to try to harass us.

The information with respect to the termination of the transaction and what happened is all on the Giants Stadium side, not on the debtor side. And the information

that they want here is, at the end of the day, we don't know whether it's going to be irrelevant or not, but it may very well be a waste of our resources to produce all of this stuff now, when we haven't made a decision as to what our defenses are actually going to be here.

Again, we have preliminary views or else we wouldn't have been able to engage in the settlement talks. But I can tell you that what's going on here is purely a harassing set of 2004 requests. And they are unnecessary because at some point, if we object, Giants Stadium will have a complete opportunity to take discovery.

Thank you, Your Honor.

THE COURT: Okay. Thank you. Mr. Clark.

MR. CLARK: Good morning again, Your Honor.

You know, some of the points that you made in your questions frankly fit rather well with the points I was going to make to the Court. First of all, on the gotcha issue, we have not argued at all, and I'm not arguing today that because Lehman entered into settlement negotiations and we had a mediation and all of that, that they somehow waived their rights. That's not what we're saying, and I think that's what Your Honor meant when you said there'd be no gotcha. And I'm equally sure, although I didn't raise it because I didn't think it was necessary, there was no gotcha for the Giants either. I mean Giants Stadium wasn't waiving

any rights because they went into a year or more of discussions at the same time.

But it is a fact that the debtors today are in a different posture, and not just because of the passage of time, although there has been a lot of time that has passed. They just conceded, as I think the transcript will show, that they're not going to do anything other than object to the claim in one form or another. They're going to object to it, they're going to file an adversary proceeding to collect on their view of what they have is right, but this is going to become a contested matter in one form or another. It already really is. And that's the problem.

In order to get this to the point where we think the parties have a better chance to resolve this, if it has to be through litigation, so be it, there has to be discovery on both sides. This last point about us wanting documents from them because of harassment is completely unjustified.

If you look at the paragraphs of documents that we're describing the documents we're asking for, and you read the transcript of Mr. Slack's deposition of Ms. Procops (ph), everything we've asked for practically is in there. It's what's at issue in this case. It's not as though we're wasting our time putting together document demands to make them file a motion. We have no interest in that whatsoever.

I think the key in this situation is your question, your point, that shouldn't at this point the obligations to produce information and to proceed be reciprocal. And I think the answer to that has got to be yes. And as an indication of the status that we're in, of the stage that we're at, I refer the Court to the new deposition subpoena, the second deposition subpoena, which is a 30(b)(6) deposition. That is not an investigation tool. That's a litigator's tool, to help resolve a dispute that is already there.

They want us to educate Ms. Procops on all the things that they say she didn't know about before, and on a bunch of other topics. And the reason they gave was to bind her to that testimony, and to bind us to that testimony. That's not investigation, that's litigation. We're already at that stage, and that's what they're asking for, and that's why we think either of two things has to happen.

Number one, their current subpoenas for additional documents, much of which is repetitive of what we already gave them, and for this additional deposition should be quashed, so that there is not this continuing façade of an investigation. They should not be allowed to simply say it's preliminary. They said that 14 times at least in the papers that they submitted to the Court.

It's preliminary, therefore, it's likely to have a

white feather. We can continue to do whatever we want to do and it's one way. There's no way that they have not made up their mind that they're going to take action either to object or to file an adversary proceeding. Nobody in this courtroom can believe that, I hope Your Honor doesn't.

So if the motion to quash is granted, then we're at a point where they would have to move forward, and either object or file the adversary proceeding as far as I can see. Our request for discovery under Rule 2004 is an alternative if we're going to continue this 2004 process, we think we should at least be allowed to begin to get the documents from Lehman's files that bear on the same issues that they have raised.

In another case mentioned, Mr. Slack mentioned the FDIC application and Drexel Burnam. In the Federated case, the FDIC came in the same way, and they had major claims, and they wanted to take discovery, I think it was of the creditor's committee, and the Court permitted that.

And the Court said I'm going to permit it because these are people who are just preparing their arsenals for battle. And the way they're going to get to a resolution at the end of the day is if they both know as much as they can about the other side's position. So that's where we are.

We would like to be able to have this is in a position where we can take discovery, they can take

discovery. I think personally that that is the best way we're likely to get to a resolution of this. And I think it's fair at this point. The bankruptcy has been -- it's over four years old. We've been in some sort of contest with the folks from Lehman for over two years. It's simply time to move on to the next stage, and that's why we're objecting to their discovery and suggesting alternatives.

THE COURT: All right. Thank you. Anything more, Mr. Slack?

MR. SLACK: Just a few -- a couple of minutes.

Your Honor, with respect to the 30(b)(6) deposition, and I think it's important to understand that we took a deposition of a particular person, Christine Procops, who's the CFO of Giants and (indiscernible) Giants Stadium, and there were many instances, and we've put it in our papers where there were critical things that she didn't know. So we actually had a conversation with counsel for Giants, where I said, look, we can take, you know, the deposition of the other people who all happen to be more senior. They're the MARs (ph) and the TISH's (ph). And we said, what we're willing to do is we're willing to take, because we just want the information, we're willing to take a 30(b)(6), you can designate whoever you want, but then you have the obligation to educate.

It is purely an investigative tool to find out the

answers that we didn't get from that deposition. It is not a litigation tool, and we took this tact because we thought it would be more palatable, though, perhaps we should just go and take the depositions of the other senior people, that was another way, you know, of getting potentially to that information. But it was purely seeking information and not trying to, you know, go forward with any kind of litigation.

And other than that, Your Honor, I would say as follows. Is that when they say that they've never tried to say this is a gotcha, all you have to do is read the first line of their reply. Where they say that debtor's cross motion is premised on the unsustainable argument that debtors have adopted only a preliminary position as to the merits. And then they say, "To the contrary, although Giants Stadium is constrained from disclosing the substance of settlement negotiations, it's clear the debtors have determined to object to the claims."

What they're saying, Your Honor, I think is exactly the gotcha. It's exactly that because we entered into settlement discussions which they had an agreement that we could do and not give up our rights to 2004, and this Court gave us assurances we would not, so.

THE COURT: How are you giving up rights to 2004 if those rights are conditioned in whole or in part on some reciprocal discovery?

MR. SLACK: Well, two fold on the reciprocal discovery. I think that the idea of giving reciprocal discovery for what is essentially a claims dispute doesn't make any sense until there is a determination essentially in the investigation.

And the reason for that is what I said, number one, is that it might be wasteful, and number two, it sets a bad precedent. But I would ask a different question on top of that. Which is, what's the harm, assuming they're right, that they're going to have a -- you know, an objection and this -- you know, what's the harm in letting us finish our investigation over the next three or four months, and then if we file an objection, they'll get full discovery.

They need the discovery for the claims process, and they'll have it, because Your Honor's going to make sure that they have whatever they need. But that's the way all the other claims work, and that's the way this should.

And I would ask the Court one other thing, which is to consider that they still have not answered the inconsistency in their own position between their motion to quash and their motion to take discovery. Because if you look at their argument, GRH and the other pages and pages they raise, their own argument is that they're not entitled to it once they file their claim, and they've never addressed that inconsistency. Thank you, Your Honor.

THE COURT: Okay. One more thing.

MR. CLARK: Okay. I'll address the inconsistency. It's simply a situation of -- there are a number of courts that have said you can have discovery even after you filed a claim, so it's not inconsistent across the board. The only thing we're trying to do, the only thing we're trying to do is to have some sort of a process that will let this resolve itself sooner rather than later.

And the things that we've asked about are not just -- they are not under the control of Giants Stadium. We've asked questions about how they evaluated and viewed the termination process, about what if any steps they took, that they were obligated to take under the papers, including going out and getting quotes in the market, and doing a number of other things. These are all issues, they're all documents that are directly tied to issues that are presented in this case.

We think the best thing to do would be to go to the next stage, whether there's an objection or an adversary proceeding, and then you're right, all this discovery gets resolved hopefully without Your Honor ever seeing us again for that purpose.

But if we're going to have this continuing Rule 2004 discovery, then the only way it seems fair to us is to have both sides have access to it. And, you know, if you

look at the -- I know Your Honor's familiar with all this, so I'm not going to belabor it, but if you look at the background, the Cameron case and all the other cases that dealt with the origins of Rule 2004. Originally it dealt with a situation where a receiver came in, wasn't familiar with the debtor, and had to have an expansive and quick, quick review of the debtor's assets in order to protect creditors. That's what any number of the cases have said.

It is not an excuse to allow a debtor in the circumstances present here to just continue with their investigation because the investigation is preliminary and not final, and it's not final because it's preliminary. That's what they're saying. It's a little circular, and I think we ought to move on. Thank you.

THE COURT: Okay. Well, thank you for your candor in answering the Court's questions and in your presentations. I don't see this as a typical use of Rule 2004. Nor do I see it as a case that will open the proverbial floodgates of other discovery in part because Mr. Slack in his presentation, candidly observed that at this juncture, more than four years into the Lehman bankruptcy case, his client really doesn't fully understand all elements of claims arising out of this complicated auction rate hedge.

And it's apparent that if they could determine now

that they had an affirmative claim, they would assert it. Lehman has not been shy about asserting such claims in the past. Additionally, it seems fairly obvious that if Lehman had sufficient information available to it that would support not just a shotgun approach objection but a specific and tailored objection to the claim, it would file it.

Throughout this case, Lehman has been active in filing and pursuing objections to claims, and in fact, part of this morning's agenda relates to objections to claims. And so I view this as an exceptional case. And, in fact, that was one of the reasons I asked a number of questions at the outset to determine to what extent the issues that related to this discovery dispute were exceptional and unique, and to what extent this was just another example of a derivatives dispute, this one happening to have the negative gloss of active discovery disputes, as opposed to active negotiations leading to a settlement.

I believe a continuing 2004 discovery under the circumstances makes sense, although the fact that this is occurring 14 months after our last discovery dispute is a terribly negative fact. One conclusion to be drawn from the mere timing of this, is that this dispute is taking too long to resolve, and that despite best efforts, reasonable people are unable to get to yes, and they should.

And so I'm going to propose that counsel meet and

confer in an effort to develop what I'll call a reciprocal discovery protocol, and it is not necessarily limited to 2004. I believe that one of the things that distinguishes the dispute that I've heard a lot about this morning from other disputes, is that there is no foreseeable outcome here in which Lehman is not objecting, or bringing affirmative claims relief.

This is not a situation in which Lehman is engaging in a 2004 process to later shake hands, and say here's the money. I also believe even though everybody has denied this that the 2004 dance that we're engaged in necessarily has tactical aspects to it. And so here's what I am directing.

Between now and the first of the year, I would like the parties to develop and agreed discovery protocol that will be applicable whether we're dealing with 2004 discovery or claims related discovery. It would be extraordinarily wasteful for the discovery that's taken in 2004 to be replicated again. And in the case of Ms. Procops, that's already happening. Enough already.

I recognize that the 2004 sword is more properly used by the debtor than by the creditor in this instance. And so discovery from third parties and discovery from Giants Stadium and discovery from Goal Line may be more appropriate than discovery from the debtor. But that does not mean that some discovery from the debtor is not also to

be part of this process.

One of the mysteries from the perspective of the Court is that this third party discovery and discovery from others is so critical from the debtor's perspective in being able to formulate its own position with respect to the claim. But I accept the representations made that ongoing 2004 discovery is needed in order for the debtor to complete its investigation to use its words.

I would ask the parties to report the results of these efforts at the December omnibus hearing. You don't have to the point of an agreement, in fact, you could be to the point of no agreement. I'd like to know that, in which case I will then be able to either rule or take this matter under advisement, but I have I think provided sufficient guidance here to suggest that what I consider to be an appropriate result is reasonable discovery going in both directions with the understanding that the need for that discovery is more obviously greater for the debtor. And this is not an example of gotcha because I am indicating in agreement that continued 2004 discovery is appropriate for the debtor and the debtor's benefit.

I'm also noting the time's up in effect. This has to come to a conclusion. And I don't expect there to be another discovery dispute between the parties until there's active litigation between you. And I hope that doesn't

occur at that point either. So I'll hear from you next time.

MR. CLARK: Your Honor, just a question of clarification. How does the January 1st deadline fit with the next omnibus hearing? I'm not --

THE COURT: I don't know.

MR. CLARK: Okay.

THE COURT: I'm just looking for a status report at the next omnibus hearing. And if it doesn't fit well for the parties, it can always be put off, and then we can make that a telephone conference.

MR. CLARK: Thank you, Your Honor.

MS. MARCUS: Your Honor, the December hearing is December 19th.

THE COURT: 18th?

MS. MARCUS: 19th.

THE COURT: That seems like a perfect date for a status report.

MR. MARGOLIN: The omnibus hearing is on December 12th, Your Honor.

THE COURT: Why am I hearing different dates?

MS. MARCUS: Sorry. Sorry, Your Honor. December 12th, sorry about that.

THE COURT: December 12th is a perfect date, too. Either one's fine.

MR. CLARK: Thank you.

MR. SLACK: Thank you, Your Honor.

MR. MARGOLIN: Good morning, Your Honor. Shall we wait until --

THE COURT: Why don't we just wait for those people that are leaving to exit.

MR. CLARK: Thank you.

(Pause)

MR. MARGOLIN: Good morning, Your Honor, Jeffrey Margolin, Hughes, Hubbard and Reed for the SIPA Trustee, Mr. Giddens. We have two uncontested matters on this morning's agenda. The first one is a settlement agreement proposed with the LBF Chapter 15 debtor that is going to be handled by my colleague, Mr. Greilsheimer, and then a portion of the trustee's general creditor claim procedures motion which is going to be handled by my colleague, Meghan Gragg.

THE COURT: Okay.

MR. MARGOLIN: Thank you.

MR. GREILSHEIMER: Good morning, Your Honor, Jeff Greilsheimer for the SIPA Trustee.

This is a global resolution of all of the claims between LBI and Lehman Brothers Finance. It was an aggregate amount of about 6 billion that was submitted to LBI by LBF. We have resolved that allowing a claim of approximately 190 million as a customer claim and 360

million as a general creditor claim against the estate. And it is a complete resolution of everything that we have going between the estates. We believe it is well within the trustee's discretion, and is an excellent result for the estate.

If Your Honor doesn't have any questions, Mr. Krakow on the Chapter 15 proceeding.

THE COURT: I'll handle them together. I've reviewed the papers. It seems like a very fair and balanced approach, and there are no objections. So this becomes as close to a lay up as we get when we're dealing with $6 billion.

MR. KRAKOW: Your Honor, Robert Krakow for LBF. I'm not sure there's anything I need to add then. This is a very fair and substantially negotiated settlement that's the combination of months of efforts by accountants and lawyers, and ultimately the business people on both sides, so it is a fair and reasonable settlement, as reflected by the fact that there are no objections either with respect to the LBF case or the LBI case.

THE COURT: I'm very pleased with the outcome, and I know that these things when they're finally resolved look fairly plain and straight forward on the docket, especially when they're uncontested, but that in dealing with the disputes between these two estates over the years, I know

that there have been any number of difficult issues that needed to be reconciled, and I'm delighted that they have been. It's approved.

MR. KRAKOW: Thank you, Your Honor.

MR. GREILSHEIMER: Thank you, Your Honor.

MS. GRAGG: Good morning, Your Honor, Meaghan Gragg from Hughes Hubbard and Reed on behalf of the SIPA Trustee. The next matter on the calendar is the Trustee's motion for approval of general and credit objection procedures.

After consulting with parties in interest, we decided to bifurcate the motion, so we're only presenting the motion as it pertains to the objection procedures today. We've not received any objections. We have incorporated comments received from LBHI, Libby and the ad hoc group, and those changes are reflected in the revised proposed order that we submitted on Monday.

You'll see in the revised proposal we've removed the provisions related to the settlement or the settlement procedures. And the motion as pertaining to the settlement procedures will be presented at the December 12th hearing. So unless Your Honor has any questions about the objection procedures, we respectfully request that Your Honor grant the motion as it pertains to the objection procedures.

THE COURT: It's unopposed and is procedural. It reflects the comments of principal parties in interest and

it's approved.

MS. GRAGG: Thank you.

MS. MARCUS: Your Honor, I think that brings us to the claims hearing portion of our agenda.

MR. MARGOLIN: Your Honor, may counsel for Hughes Hubbard, the SIPA Trustee be excused?

THE COURT: Yes.

MR. MARGOLIN: Thank you.

MS. MARCUS: I think that brings us to the claims portion of the agenda. Just a note for the Court. There were quite a few matters that have been scheduled to the October 31 hearing. We did submit, I think it's two separate certificates of no objection that dealt with most of those because many of them were uncontested.

The first matter for the Court's consideration today is an uncontested matter that will be handled by my colleague, Kyle Ortiz. It's number seven on the agenda.

MR. ORTIZ: Good morning, Your Honor, Kyle Ortiz of Weil on behalf of Lehman Brothers Holdings, Incorporated as plan administrator.

As Jackie said, the next item on the agenda is the 357th omnibus objection which is an uncontested matter. The 357th omnibus objection seeks to reclassify certain claims that asserted either priority or secured status as general unsecured because the claims do not meet the criteria

required to be entitled to priority or secured status.

The 357th omnibus objection included four claims. Three of the four claims asserted priority claims under Section 507 of the Bankruptcy Code, but did not provide any basis upon which they are entitled to such claims, and LBHI did not receive a response from those three claimants.

The fourth claim subject to the 357th omnibus objection was asserted by Magnetar Structured Credit Fund and asserted a secured claim based on an alleged right of set off. Although Section 506(a)(1) of the Bankruptcy Code does provide that a claim subject to set off under Section 553 is a secured claim, Magnetar has not asserted any obligations that it's seeking to set off, and thus has no valid basis for its claim to be classified as secured.

Although Magnetar did not file a formal response, they did however reach out to LBHI, and requested that we add certain language to the order explicitly reserving certain of their rights, clarifying that the order has no res judicata estoppel or other effect on any future rights they may have to assert a valid right of set off.

We did agree to this additional language and it's consistent with language that we've included in other orders that we sought to reclassify secured claims that were based on set off as unsecured claims. I do have clean and marked copies of the revised order with me today, if Your Honor

would like to review those at this time.

THE COURT: If you have a blackline version, why don't you hand it up.

MR. ORTIZ: Absolutely. May I approach the bench?

THE COURT: Yes. Thank you.

MR. ORTIZ: The added decreetal paragraph is on the second page. If Your Honor has no questions at this time, I would request that this order be, that is uncontested, and we did add the language requested by Magnetar be entered at this time.

THE COURT: The objection is approved on an uncontested basis, consistent with the language of the order as amended.

MR. ORTIZ: Thank you, Your Honor. I will now turn the podium over to my colleague Jackie Marcus.

MS. MARCUS: Thank you, Your Honor. The next matter on the agenda number 8, is the objection filed by Lehman to a claim filed by Laurel Cove Development.

Your Honor, we've been before you on this matter several times in the past. I suspect that you may remember the facts, but I'm just going to go into them very briefly.

Laurel Cove has filed a claim in the amount of $150 million against LBHI. The claim allegedly arises out of LBHI's failure to fund the remaining balance of $34 million under a construction loan provided by LBHI to Laurel Cove.

LBHI entered into the construction loan agreement in May of 2007, and funded approximately $86 million under that loan agreement. On September 14th, 2008, just one day before the commencement of the Chapter 11 case, Laurel Cove requested a further draw in the amount of $5 million.

The draw request was defective, and was not funded prior to the commencement of LBHI's Chapter 11 case. Over the next two weeks, representatives of TriMont Realty Advisors, the loan servicer, and Laurel Cove engaged in exchange of e-mails regarding the draw request. Copies of that e-mail correspondence are attached to our reply.

In the meantime, on September 17th, an LBHI affiliate, Lehman Re notified LBHI that it was in default under a series of repurchase agreements, and therefore, Lehman Re was taking possession of certain repurchased loans including the Laurel Cove loan.

In the objection, Lehman has asserted numerous bases for its contention that it has no liability for the Laurel Cove claim. First and most importantly we contend that after the default date, which was September 17th, Lehman Re rather than LBHI bore responsibility for funding the construction loan. And second, in the unlikely event that the Court determines that LBHI is responsible for the funding obligations, we take issue with Laurel Cove's assessment of damages and the magnitude of the damages.

In response to LBHI's objection, Laurel Cove essentially makes three arguments. First, that the September 14th draw request was not defective. Second, that the settlement agreement represented the settlement agreement between LBHI and Lehman Re represented an impermissible assumption and assignment of the loan agreement without notice. And third, that LBHI may have assigned its rights under the loan, but it did not assign its obligations under the loan.

As to whether or not the draw requests was defective, in its reply as I mentioned, LBHI attached the e-mail correspondence which indicates that Laurel Cove had failed to properly substantiate its draw request, and that Laurel Cove was, in fact, made aware of that failure. Thus the statement in the Najohn (ph) affidavit filed by Laurel Cove to the contrary is belied by the evidence.

Moreover, we have also filed the declaration of Nicholas Lane of Trimont in support of the objection that indicates that virtually every draw request that Laurel Cove had submitted was initially deficient, and it was in all cases, a back and forth between Lehman, Lehman's representative, Trimont and Laurel Cove regarding the draw request. Mr. Lane couldn't be here in person today, but he is on the telephone from Atlanta.

The documents between the parties in the prior

proceedings before the Court reflect that Laurel Cove's second and third arguments are simply wrong. Pursuant to the settlement agreement that I eluded to between LBHI and Lehman Re, the parties agreed as follows, and I quote,

"One, Lehman Re is and has been the sole owner of the Laurel Cove loan since the default date. Two, Lehman Re shall have all of the Lehman U.S. entities right, title and interest as lender under the Laurel Cove loan as of the default date. And three, Lehman Re shall have assumed all of the Lehman U.S. entities' obligations as lender arising from the documents evidencing the mortgage loans as of the default date and thereafter."

That's paragraph 1 of the settlement agreement. The settlement agreement was approved by this Court in August 2009. The language in that order provides that the Lehman Re MRA loans were not and never were property of LBHI's estate, or LCPI's estate. Therefore, there was no need for LBHI or LCPI to assume and assign the construction loan under Section 365.

Indeed paragraph 13 of the settlement agreement itself expressly provides that "nothing in this settlement agreement is or shall be construed to be an assumption or an assumption -- an assignment of the MRA by LBHI or LCPI pursuant to the Bankruptcy Code, including under Section 365."

Moreover, when Laurel Cove moved for an emergency hearing by order to show cause in January of 2010, to prevent a foreclosure in Tennessee, the Court determined and Laurel Cove conceded that Laurel Cove had actual notice of the settlement agreement prior to the hearing for Court approval of the settlement agreement.

Counsel for Laurel Cove also acknowledged that at least as of October and November 2009, it was quote, absolutely aware that Lehman Re was the appropriate party with which to discuss any protective payments and settlement issues, and I refer the Court to the hearing transcript at page 27.

The Court should fine, as it did at the January 2010 hearing, that Laurel Cove's attempt to collaterally attack the validity and enforceability of the settlement order, quote, is based upon allegations that are simply not credible, close quote. And that was the transcript at page 41.

Finally, the terms of the settlement agreement and the Court's findings with respect thereto also address Laurel Cove's argument that LBHI assigned its rights but not its obligations under the construction loan. The loan agreement did not include any limitation on LBHI's rights to assign the loan, or include a proviso that any assignment would be ineffective to transfer liabilities. This was a

sophisticated borrower, and it could've negotiated for that language, but it did not.

LBHI was in the business of making loans and transferring them, so it's not even clear whether LBHI would have made the loan if it so admitted. The Court rejected Laurel Cove's privity argument at the January 2010 hearing, calling the argument quote, a quaint notion in a world in which loans are routinely transferred and securitized, close quote. That's page 24 of the transcript.

Furthermore, there's no question, Your Honor, that Laurel Cove treated Lehman Re as the lender after the default date. It received over $800,000 in advances from Lehman Re. Laurel Cove entered into a pre-negotiation letter with Lehman Re in April 2009, and Laurel Cove engaged in extensive negotiations with Lehman Re throughout the autumn of 2009.

For all of the foregoing reasons, Your Honor, LBHI requests that the Court enter an order expunging the claim in its entirety. In the alternative, if the Court does not grant the relief, then LBHI requests the right to contest the amount of the damages at a future hearing.

THE COURT: Let me just ask you a couple of procedural questions.

MS. MARCUS: Sure.

THE COURT: And I'm aware of both the hearing in

August of 2009 and the hearing in January of 2010, and in connection with my preparation for today's hearing, I reviewed the transcript of the hearing from January of 2010.

And one of the questions I have relates to the preclusive effect, if any, of the determinations made during the January 2010 hearing, particularly since they were made in the context of an emergency hearing seeking injunctive relief, in reference to a foreclosure sale in Tennessee. And my findings with respect to this Court's intervention in a state law action in Tennessee speak for themselves, but it's not clear to me that they have preclusive effect. I'd like you to comment on that.

Secondly, I know based upon the record that the loan in question was transferred from Lehman to Lehman Re in accordance with the terms of the settlement agreement that was approved in August 2009. What is not clear to me is the impact, if any, of that transfer upon the rights of Laurel Cove to pursue claims for damages associated with the affiliate to fund the loan. And so I'm interested in your views as to that.

And finally, and this is a question that really goes to counsel for Laurel Cove, whatever claims Laurel Cove may have, presumably should be made against one responsible party, that's not to say those claims have merit. What is the status of claims made as to Lehman Re?

MS. MARCUS: Okay. As to preclusive effect, Your Honor, I recognize from reading the transcript that at least some of your findings on that day had to do with whether it was appropriate to run into court at the eleventh hour and try to prevent the foreclosure.

But in connection with that, for example, a finding that Laurel Cove had notice of the settlement agreement and the hearing and knew what was -- the settlement agreement between Lehman Re and LBHI, had notice of it, could have appeared, did not, that kind of finding I think should have preclusive effect on Laurel Cove. They were here, they were arguing, and that should have preclusive effect on them.

Similarly, I think other factual determinations that the Court made as to what was going on, the fact -- the privity argument, the fact that Lehman really wasn't in the business of making loans and holding them, but the environment, the business environment then was you make a loan and you transfer it. Those, I believe, should have preclusive effect.

As to the second question, which is the transfer of the loan from Lehman to Lehman Re, I agree with Your Honor that to the extent there would have been a damage claim for something that happened before that moment, and the moment really isn't in November of 2009 when the settlement agreement is signed, because on September 17th, I believe it

was, it may have been a few days later, Lehman Re said, I own this loan, and I am now taking over for this loan.

But damages that may have occurred before that transition happened, I think might be the basis for a valid claim. But for Lehman Re to have engaged in negotiations, accepted funding -- excuse me, for Laurel Cove to have engaged in negotiations and accepted funding from Lehman Re for quite some time, $800,000, significant even in this case, and then to take the position that the whole sequence of events that occurred thereafter was LBHI's fault we think is inappropriate.

And that there are a number of cases that say that a party can quote, consent to release the original obligor by its actions as well as by affirmatively consenting. And unfortunately, the cases in this area are all about one page, and they don't get into very much legal reasoning. But they all quote -- I think the leading case is Manley v Fisher, where they say, the parties, the original party either has to consent in writing, or through its actions. And here Lehman -- excuse me, too many L's. Laurel Cove's conduct here directly manifests that Laurel Cove was looking to Lehman Re.

Third, and I know this one was a question more for Laurel Cove's counsel, my understanding is that Laurel Cove has filed a claim against Lehman Re, and I think Lehman Re's

counsel is here as well.

THE COURT: Okay. Thank you.

MS. GOLDSTEIN: Good morning, Your Honor, Cara Goldstein from Stagg, Terenzi, Confusione & Wabnik on behalf of Laurel Cove Development LLC.

Just to I guess start in the order that Lehman's counsel started, going back to the draw request. The draw request in September and October of 2008 were in substantially the same form as all of the prior draw requests, which were approved. Each time there was back and forth between the parties for additional back up, additional detail, but the form of the request was never noted as defective. It was the same form that was approved.

As a matter of fact, in the ultimate notice of default that was sent to Laurel Cove, the default was never based on defective draw requests. It was based on various expenses not being paid which was a result of the funding never being provided.

Then as far as the privity question, it is Laurel Cove's position that it entered into the construction loan agreement with LBHI, that whether the agreement was ultimately assigned or sold, or became the property of Lehman Re that Laurel Cove is in privity with LBHI. It did not consent to the assignment of LBHI's obligations under the construction loan.

And you expressly or impliedly Lehman -- Laurel Cove, at some point was dealing with LBHI and Lehman Re because between the two parties, there was a time when they were not sure who was actually responsible, and so Laurel Cove was trying to deal with both of them. They were trying to get funding to get the property continuing to engaged. It had gone up to phase one through August prior to the bankruptcy. Clearly the funding requests in September were at the time of bankruptcy. So we understand why they weren't funded, but that's what's led to the ultimate default.

We have filed a claim against Lehman Re, they actually just sent us documentation requesting additional information on the claim. So we feel that LBHI is the party that we contracted with, that has an obligation to Laurel Cove. You know, that's where we are at this matter. We haven't gone any further with Lehman Re.

THE COURT: I understand what you just said, but you're also telling me that you are playing both sides of the field on this one. That you're seeking to prevent expungement of a claim against Lehman, at the same time that you're pursuing claims against Lehman Re. Are you claiming that Lehman Re had a funding obligation, too?

MS. GOLDSTEIN: Well, I think we're trying to protect Laurel Cove's rights in the event that it's

determined that LBHI is not going to have liability. It's clear that somebody has to have liability for the lack of funding. And whether it's ultimately LBHI or Lehman Re, we're trying to, you know, file the timely claim in both of those actions to protect Laurel Cove's rights.

THE COURT: Okay.

MS. MARCUS: Just to clarify, Your Honor, with request to the draw requests. Our position with respect to the draw requests wasn't that it was fatally defective, and therefore Laurel Cove was in default. Our position is the timing, which as you know more than anyone, is so critical in this case, their request came in on September 14th. It was an LBHI obligation on that date, but it wasn't a valid and appropriate request.

By the time the kinks were ironed out, the loan had already transitioned to Lehman Re, and therefore, it was a Lehman Re obligation rather than a Lehman obligation.

THE COURT: Okay. I'm not going to rule on this today. And I believe that the record needs to be supplemented with information concerning what happened on September 14 in connection with the draw request. To the extent that the draw request was in a form comparable to similar requests made and honored prior to that date, that may be a fact of significance to the analysis. I'm not making any preliminary judgments on this at this point,

except to say that I think the record is insufficient to expunge the claim. It may be sufficient in the future to expunge the claim.

And would suggest that the parties, if they haven't already done so, consider the most expedient means to develop and process the facts relating to the draw requests and other issues surrounding any liability that LBHI may have with regard to the unfunded loan.

These discussions conceivably could lead to some agreement to compromise the dispute, and that would be perfectly acceptable to the Court.

MS. MARCUS: Thank you, Your Honor. For calendar purposes, should we just carry this?

THE COURT: Carry it to some workable date in the future.

MS. MARCUS: Okay. We'll do that, Your Honor.

The next matter will be handled by my colleague, Candace Arthur.

MS. ARTHUR: Good morning, Your Honor. For the record, Candace Arthur of Weil, Gotshal & Manges, on behalf of Lehman Brothers Holding, Inc. as plan administrator.

We're moving forward today with respect to the single remaining claim on the 320th omnibus objection. The plan administrator filed the 320th omni seeking to expunge and disallow those claims filed against LB Rose Ranch, for

which Rose Ranch does not have any liability.

Specifically, we are addressing proof of claim number 24572 which is filed by Mr. Richard Cogden (ph) and Ms. Rosemary Knox (ph). The claimants are seeking reimbursement of their membership agreement that they entered into with LB Rose Ranch on April 29, 2003.

The terms of the golf club membership agreement provided that the claimants had to submit a deposit in the amount of $35,000, and it also was a proviso in the agreement that stated, in the event that the membership agreement was terminated, they would receive a refund on their deposit.

In connection with the confirmed Chapter 11 plan of LB Rose Ranch, affiliated debtors, Rose Ranch moved to assume, among others, the membership agreement of Mr. Cogden and Ms. Knox. The claimants did not object to the assumption. It was reflected in the plan supplement, and they did not object to the cure amount in the cure notice as is reflected.

Accordingly, the membership agreement was assumed under Section D-65 of the Bankruptcy Code and any claims that the claimants would have otherwise had based upon a prepetition breach of Rose Ranch with respect to the agreement was effectively waived.

To date, Your Honor, Mr. Cogden and Ms. Knox still

enjoy the privileges and rights under the agreement. They have not terminated the agreement. And upon receipt of their August 7th response to the omnibus objection, I did personally reach out to them, clarify the plan administrator's position, provide them with excerpts from the plan supplement, and also confirmed the status of their membership, the claimants did express that they would like to maintain the golf club membership as it is.

It is unclear how the claimants have a right or entitled to receipt of the membership deposit as well as can remain active members. Accordingly, and unless Your Honor has any questions, the plan administrator seeks to have the 320th omnibus objection granted with respect to this claim, and have the claim expunged, and disallowed in its entirety.

THE COURT: Are the claimants participating in this hearing either in person or on the telephone?

(No response)

THE COURT: I hear no response. They're enjoying the benefits of their membership, and they have no claims as a result, and I wish them a good golf game in the future, and they have no claims in this case.

MS. ARTHUR: Thank you, Your Honor. Also, in addition to the 320th omnibus objection, as we have noted, we did receive a response by Ms. Kay Young, and she's proof of claim number 8241. I just wanted to provide a status

update, that in connection with our discussions as well, and in correspondence, providing her the same excerpts, clarifying the effect of Rose Ranch's assumption. She has agreed to not object to the expunging of her claim, and to the extent that you'd like to see the e-mail traffic between myself and the claimant, we have that today as well.

THE COURT: Okay. Fine. Thank you.

MS. ARTHUR: Thank you, Your Honor.

THE COURT: And you'll be submitting orders reflecting what --

MS. ARTHUR: Yes, Your Honor, we will.

THE COURT: -- we've just discussed?

MS. ARTHUR: The next matter on the agenda will be handled by my colleague, Kyle Ortiz.

THE COURT: Okay. Thank you.

MR. ORTIZ: Good afternoon again, Your Honor. Kyle Ortiz from Weil on behalf of Lehman Brothers Holding, Incorporated as plan administrator.

The next and final item on the contested agenda is the 329th omnibus objection. This is a carryover from two prior hearings. The 329th omnibus objection relates to the claims that were filed by employees that asserted priority status under Section 507(a)(4) of the Bankruptcy Code, that exceeded the $10,950 cap in place for such claims at the time of LBHI's Chapter 11 filing.

LBHI is not contesting the merits of any of these claims on the 329th omnibus objection, or addressing the question of whether any of the claims on the 329th omnibus objection are, in fact, entitled to priority under Section 507(a)(4) up to the cap. Rather, the 329th omnibus objection simply seeks to reclassify any amounts in excess of the $10,950 statutory cap provided in Section 507 of the Bankruptcy Code, in order to allow LBHI to more closely align its reserves with what maximum distributions may actually be.

And LBHI does reserve all rights to object to the claims on the 329th omnibus objection, based both on their merits, and with any portion of such claims is in fact entitled to priority status in the future.

The vast majority of the claims in the 329th omnibus objection were reclassified on an uncontested basis at the August 23rd, 2012 hearing. The 329th omnibus objection was then contested by two claimants at the September 27th, 2012 omnibus claims hearing, and the Court did enter an order granting the relief requested by LBHI at that time with regard to those two claims.

Today, we have one remaining response, contesting the 329th from Claimant Theresa Carpenter. Ms. Carpenter's claim is based on amounts allegedly owed under a severance agreement that she entered into with LBHI on September 9th,

2008.

Ms. Carpenter checked the box under proof of claim form indicating that her entire claim was entitled to priority status under Section 507(a)(4). And Ms. Carpenter's response to the 329th omnibus objection, she states that she was informed by Lehman Brothers human resources that her severance package would be fully paid, and thus her full amount should be paid and should not be categorized as unsecured. And she did provide her September 9, 2008 severance letter as evidence to support this assertion.

But LBHI does not dispute at this time that a severance agreement was entered to. And as previously noted, LBHI by the 329th omnibus objection does not take any position to whether any portion of Ms. Carpenter's claim is entitled to priority. Rather, LBHI is simply asserting that to the extent any portion of Ms. Carpenter's claim is entitled to priority, that is nonetheless still subject to the cap applicable with such claims, and thus, all portions of Ms. Carpenter's claim asserted as priority in excess of the $10,950 cap imposed by Section 507(a)(4) of the Bankruptcy Code in place at the time of LBHI's filing should be reclassified as unsecured.

Your Honor, I do not believe that Ms. Carpenter's in the courtroom today, but to the extent --

THE COURT: She is. She just raised her hand.

MR. ORTIZ: Sounds great.

THE COURT: And she's coming forward. See courtroom events are almost always surprising.

MS. CARPENTER: Good morning.

THE COURT: Good morning.

MS. CARPENTER: So --

THE COURT: Actually good afternoon now.

MS. CARPENTER: Oh, is it? Okay.

So, yes, I'm here to object to reclassifying my claim as unsecured. The amount over --

THE COURT: 10,950.

MS. CARPENTER: 10,950, yes.

THE COURT: Now, has Lehman's counsel fairly characterized in his presentation the basis of your claim, which is you had a severance agreement that was entered into on September 9, and that human resources represented that everything in that document would be paid in full, and that's the basis for your claim?

MS. CARPENTER: Yes. I think that what the debtor's position is to state it in my words, is that they're not taking any position as to the merits of your claim as an unsecured claim at this point, but rather seeking to reclassify that portion which exceeds a statutory limit, which is imposed under Section 507(a)(4) of the

Bankruptcy Code, and which provides a limit upon compensation related claims that are treated as priority claims, for purposes of a distribution.

Do you have any legal argument, other than in effect, having relied upon what you were told at the time you were terminated?

MS. CARPENTER: I mean, my situation was a little unusual, in the sense I had just returned from maternity leave, and my job was given to someone else, and then the severance package was null and void, and you know, it was a major hardship on my family for the entire thing, four years later, and I'm still standing here trying to --

THE COURT: I'm sure that's true, and I'm aware of the hardship caused by the Lehman bankruptcy everyday that we have a hearing in the Lehman case, particularly when employee related claims are presented.

As a matter of bankruptcy law, I conclude that the arguments made by Lehman are, in fact, correct as a matter of law because employee claims are limited to, from a priority perspective, are limited to the statutory cap. And there's a reason for that. It provides certain benefits to employees that other creditors don't enjoy, in the sense that there's a priority distribution, but it's limited because generally in bankruptcy there's a balancing between the interests of creditors. So that those creditors that

enjoy a priority, for example, taxing authority, as well as employees, have certain rights that trade creditors or other creditors don't have. But they're not limitless.

So I'm granting the objection without prejudice to the treatment of other claims that you may have in excess of the $10,950 cap under the severance agreement, and I wish you well.

MS. CARPENTER: Thank you very much.

THE COURT: Okay. So the objection's granted. And does that -- that concludes the agenda?

MR. ORTIZ: Yes, Your Honor, that does conclude the agenda for LBHI's afternoon now.

THE COURT: Fine. Please submit orders with reference to all the matters on this morning's agenda that require orders. And for purposes of anybody who may be returning at 2 o'clock, there's a hearing at 2 o'clock in the Turnberry matter. We're adjourned until 2.

(Recessed at 12:10 p.m.; reconvened at 2:18 p.m.)

THE COURT: Be seated, please.

We're off to a late start.

Mr. Meister, it's your motion.

MR. MEISTER: Thank you, Judge Peck.

Your Honor, we're here on a very targeted and limited reargument or reconsideration motion in adversary proceeding, 09-0162, which is the single adversary

proceeding within the call to town square matter.

And we're just here on the third count, which was a count for a promissory estoppel that was dismissed by the Court's previous order.

The order is clear, the oral argument, I think, is clear or the Court's statements and oral arguments are clear that the Court's decision dismissing the third count, the promissory estoppel count, was predicated on the integration clause in the $95 million dollar loan in that matter.

That integration clause states -- and I'd just like to focus on two fragments on it -- quote, "The agreement/disagreement and other loan documents embody the entire agreement and understanding between the parties and have with respect to the Loan, and that's capital L, and supersede and cancel all prior loan applications, expressions of interest, commitments, agreements, and understandings, whether oral or written, relating the subject matter here hereof, except to specifically agreed to the contrary."

The two fragments I would like to focus on briefly this afternoon, Your Honor, are with respect to the loan and the subject matter, hereof, which I think just simply relates back to the first fragment with respect to the loan. The loan is defined, and there's no issue that it is, the $95 million dollar loan.

Our claim is that a promise was made for a $625 million dollar take out. The Court hasn't gotten to the evidence of that promise because the case was -- the claim was dismissed, but we believe, respectfully, it was incorrect to say that the whole integration clause and the $95 million dollar agreement bars a promissory estoppel claim with respect to the $625 million dollar take out promise I'll call it because that's a separate subject matter from the loan and there's no -- the $95 million dollar loan -- and there's no statement whatever in the $95 million dollar loan agreement that references the $625 million dollar or any larger take out.

In addition, Your Honor, the borrower -- the borrowers, I should say, under the $95 million dollar loan were two individuals, Jack -- Jacqueline and Jeffrey Soffer, and the two promisee or the beneficiary of the alleged $625 million dollar take out promise was the owner, which is Turnberry Centra Sub, LLC, I believe, which is a Plaintiff in the adversary proceeding.

So, therefore, Your Honor, we think that the -- that applying the interest integration clause in the $95 million dollar loan agreement effectively against Turnberry Centra Sub is applying -- not only does it, we believe, not apply to bar a promissory estoppel claim about this separate subject matter, but, additionally, it's being applied

against an entity, which is not a party to the $95 million dollar loan.

The way that I like to think about this is -- perhaps this is a bit of a simplification -- but if I was going to a bank and I was buying a house for a million dollars and I asked for a loan and the bank said we'll give you a 60 percent or a $600,000 loan, meaning I had to come up with $400,000, and I asked the bank for some more money and the bank said to me, Well, we'll give you a personal credit line for 100,000, so you're down payment is reduced to $300,000.

If the bank then made me that 600 -- that $600,000 loan and reneged on the $100,000 credit line, I don't think a Court would use an integration clause in a $600,000 mortgage instrument to bar my promissory estoppel claim because the $100,000 credit line is separate subject matter to at the $600,000 mortgage.

Now, the two are, obviously, somewhat related or connected and we don't back away from our previous assertions that they're connected. In other words, we said that the $95 million dollar loan operates, in effect, as an advance, or an initial advance or an interim advance or a bridge, whatever words you would like to use, with respect to the $625 million dollar loan. But that connection doesn't make them one in the same; it makes them related,

but not -- it doesn't merge the two.

THE COURT: But Mr. Meister, your theory in the case up until today has been that the connections between the two transactions are more than just incidentally related. They were, in effect, one in the same. That the inducement to enter into the $95 million dollar loan was the promise that was hanging out there somewhere in the air that there was going to be this additional financing. That was always the theory of your case and you're changing it now.

MR. MEISTER: Well, Your Honor, I don't think I'm changing it.

THE COURT: I think you are and I'm challenging you on that.

MR. MEISTER: Okay. So, let me see if I can meet that challenge, Your Honor.

It is true that we, in fact, said there was a three-property integration -- to use the term loosely -- that there was this (indiscernible - 6:44) refinancing, that Lehman wanted that refinancing to anchor a $3 billion securitization, that we agreed to give them that.

In exchange, Lehman agreed to finance Fontainebleau and to issue the $625 million dollar take out commitment, and as part and parcel of that $625 million dollar take out commitment, this $95 million dollar loan was made as an initial advance where it was contemplated that

that would be repaid out of and when -- from the proceeds of the $625 million dollar financing.

I'm not backing away from that. What I am saying is that yes, they were all connected in that sense. From a business practical sense, they were discussed together, but that doesn't mean, Your Honor, that the integration clause in the $95 million dollar loan bars a promissory estoppel clause.

I'm not here -- this is a very targeted motion -- I'm not here saying I was fraud -- today at this moment on this motion to reargue saying that I was fraudulently induced into borrowing the 95 million.

What I'm saying is that a promise was made to fund a $625 million dollar loan, that in reliance in that promise, I dropped three other specific commitments or expressions of interest from major banks that were -- that otherwise would have made this agreement, who did not go bankrupt.

And that as a result of my not going forward with those and three others, which I did -- or which my clients did because of the $625 million dollar promise -- I lost my equity in the project and that's a recoverable damage under a promissory estoppel theory.

So, I'm not saying to Your Honor that we -- my client doesn't owe back the 95 million because of this other

promise that the integration clause would bar. What I am saying is that it was not correct, Your Honor, to say that integration clause in the $95 million dollar loan bars my promissory estoppel claim. More specifically, because this claim that I'm asking you to reinstate is not even a contract claim -- in essence, it's a quasi-contract claim. It's a promissory estoppel claim. Really, the only relevance of the integration clause is that it arguably bears under justifiable reliance element of promissory estoppel. Because promissory estoppel includes, as one of its elements, that the promisor, here, Lehman, would reasonably expect to induce action or inaction on the part of the promisee, here, Turnberry Centra Sub, or the Soffers, if you'd prefer.

And -- so, let me say it to you this way: If the interest rate in the $95 million dollar loan were ten percent, hypothetically, and I came to court and said, Hey, they promised us -- Lehman said they would reduce it to five percent. Obviously, the integration clause would bar such a promissory estoppel claim because you would say, Mr. Meister, no one could reasonably rely on a promise of a five percent interest rate when they just signed a loan agreement for ten percent that contains an integration clause.

But, the same cannot be said about a $625 million

dollar take out commitment when there's a $95 million dollar loan. In other words, it is not correct, in my opinion, Your Honor, to say that it was unreasonable, as a matter of law, within the context of the 12(b)(6) motion on the pleadings for the Soffers or for Turnberry Centra Sub to have relied on the $625 million dollar take out commitment promise simply because of the integration clause in the $95 million dollar loan.

THE COURT: Let me ask you a hypothetical question.

Assume, for the sake of discussion today, there were no $95 million dollar loan and that it was simply a discussion that the Soffers had with Lehman about take out financing and Lehman said we're going to give you that financing, don't worry.

Are you saying that that would have been an enforceable promise, that you could have enforced that financial accommodation, that it would have been reasonable for your clients to have not pursued other lenders to obtain such financing?

MR. MEISTER: Your Honor, I think the answer to that question is a bifurcated one as follows.

If I were suing for a breach of contract -- if I said that that promise resulted in the formation of a contract, we'd likely get into term sheets and caveats and

term sheets and all the things that we have seen in our respective careers.

And I would likely have difficulty in that contract claim; however, that is the reason that there is a quasi-contract cause of action for promissory estoppel, which really says -- or the policy behind it, in my view is -- where the promise is such that it does not give rise to contract formation, but it would be reasonable for the promisor to believe that the promisee would be induced into action or inaction. And that inaction or action occurred, and, in fact, it would be unjust not to allow damages. I wouldn't say enforce in a specific sense, then a claim is made out for promissory estoppel.

So, there was no pre-negotiation agreement that I'm aware of here that disclaimed, which often is in these situations. So, my answer to you would be that if there were no $95 million dollar loan and all the other facts that are present here were present, I certainly think I would have a claim for promissory estoppel that survives a 12(b)(6) motion.

THE COURT: Here's the problem I'm having.

I was assuming away the most critical fact in this case which, there is, in fact, a $95 million dollar loan, and the $95 million dollar loan includes an integration clause, which you've read. And my understanding based upon

the original and amended complaint and the argument that took place leading up to the granting of the 12(b)(6) motion in Lehman's favor, is that your clients took the position and really aren't backing away from this today. That at the time of entering into the $95 million dollar loan, there was an expectation of a related incremental financing of $625 million dollars, and as a result, I don't understand how you're able to back away from the promissory estoppel problem you have in the integration clause.

This is, in effect, one thing, and while you rather (indiscernible - 14:59) say the capitalized term loan is equivalent to the subject matter hereof. In fact, the subject matter hereof may be read more broadly and I'd like you to respond to that because your argument is predicated upon the equivalence of those two words and phrases.

When, in fact, one could argue the subject matter hereof is everything we talked about as we were getting ready to enter into this loan, including that $625 million dollar incremental loan and your litigation position up to including the time of ruling against you was that these were really closely tied together.

MR. MEISTER: Your Honor, okay. Fair enough.

Let me see if I can address that cogently.

In the integration clause, that first fragment is with respect to the Loan, capital L, which is the 95

million.

The second fragment says relating to the subject matter hereof. I think the "hereof," I would read that under the last antecedent rule to directly reference the previous fragment and the loan.

In addition, there's a -- you have (indiscernible - 16:28) between 625 and 95. It's not another $10 million dollars or another $15 million dollars. It's many fold the 95 million. In addition to that, there's two different completely different borrowers.

I believe that there is a problem with using the integration clause to bar the promissory estoppel claim because you are essentially enforcing the $95 million dollar loan agreement that is not party to the agreement and that's a significant issue, I think, Your Honor, that's not dealt with in the decision.

There are -- one of the Plaintiffs to this adversary proceeding is Turnberry Centra Sub, LLC -- I hope I've stated the name correctly -- that owns or owned -- it doesn't own anymore -- the Town Square Shopping Center. That entity was the beneficiary of the alleged promise and that entity is not a party to the $95 million dollar loan agreement.

I did think hard about my simple example and I do think it has some utility. In my example there's a mortgage

loan commitment and a line of credit -- it happens to be with the same borrowers, so, in that sense, it's not on all fours.

But the net effect of those two arrangements in my hypothetical is to create 70 percent financing, and one could say it's the same thing. Meister is getting 70 percent financing for the home he wants to buy.

But the law would say that there are two separate transactions that the bank is contemplating into with their client. One is a mortgage loan and one is a line of credit. And if the mortgage loan has an integration clause that says this agreement or instrument is the entire agreement and it embodies the entire understanding of this loan, then that would not bar a promissory estoppel claim on the line of credit.

There's a case, Your Honor, that we cite to in our oral argument motion -- Roderick -- sorry, Broddick (ph). And it's a 2009 first Department case -- complicated set of facts, but sort of dumbed down a bit. A man who was in the investment banking field got a call from his cousin in Texas.

Come move to Texas, give up your job with your big, fancy investment bank, help me find money for an oil venture and I'll make you a partner in this venture.

He moves his family down. He gets $150 million

dollars of financing from some source. The oil venture is launched and the cousin reneges on the alleged promise to make him part of the -- to make him an owner of the company.

He signs two documents: An at-will employment agreement and some sort of a fee agreement where he was paid some sort of fee for finding the money. Both those agreements contain venture clauses that they are entire agreements with respect to their respective subject matters.

The trial court dismisses his fraud and promissory estoppel claims based upon the agreements and the venture clauses very much in a similar way to Your Honor's decision here. It goes up to the first Department and the decision is reversed because the subject matters of those two agreements are not identical, although clearly related to the allege promise to become a partner.

So, I think that case is meaningful here and instructive. I think it accurately reflects New York law and I think that New York law does not, in an overly broad way, read integration clauses.

And I think that reading an integration clause in a $95 million dollars loan made to Jackie and Jeffrey Soffer to stop Turnberry Centra Sub from making a promissory estoppel claim on a $625 million dollar alleged take out promise or commitment is a -- is not an accurate application of New York law as it relates to these integration clauses.

You know, on a practical level, we're pretty close to completing document discovery here, which will be fairly substantial, I think. The parties are set to exchange documents in December, early December. I supposed -- and there's thousands of documents in each side. I supposed there will be depositions in January or February.

I just think that it would be better for the Court to be considering this claim in the context of a Rule 56 summary judgment motion instead of a 12(b)(6) motion on the pleadings and applying this promissory estoppel -- applying the integration clause -- pardon me -- in the $95 million dollar loan agreement.

I'd like the Court to see the quality of the evidence about this promise, the term sheets -- which both, by the way, pre-dated and post-dated -- in other words, they were drafts -- then it pre- and post-dated the execution of the $95 million dollar loan agreement. I'd like the Court to see the e-mails between the parties.

The Court has already seen, I hope it recalls, the Ersoft (ph) affidavit, a former Lehman executive who attested that -- very clearly, that there was a very significant relationship between Turnberry and Lehman. That Lehman wanted this (indiscernible - 23:00). That Lehman did commit to a $625 million dollar take out commitment. That Lehman had -- that this is the way the parties did business.

They did promises to one another and followed through. That Lehman, in fact, breached its promise on the $625 million dollars and he says that to the best of his recollection, prior to Lehman's bankruptcy, it had never failed to perform a loan transaction it had agreed to do with any of Turnberry's entities. So, there's already -- this is a Lehman manager attested to this.

So, you have already before you credible unrefuted evidence that we are being truthful when we speak about this commitment. There are documents which you will see in this motion which corroborate what we're saying and I think that it is incorrect, Your Honor, respectfully, to use the merger clause in the $95 million dollar loan agreement with the individual Soffers on a 12(b)(6) motion to bar a promissory estoppel claim by a corporate entity or an LLC entity, on a much larger transaction, despite, as you accurately say, that the two are related.

Your Honor, we also ask, alternatively, for leave to amend only because we were not clear that the promise for the 625 million was made both before and after the $95 million dollar loan agreement was signed.

The clause -- the integration clause is clear -- it has the word "prior" which modifies a series of words that follow it, one of which is "understanding" and "agreements." And so it would have no application to -- it

would have no application to a promise made.

Just an hour before coming here, I reviewed a term sheet that was disseminated by Lehman a month after this loan agreement was executed. So, at a minimum, we would like permission to amend to make that one allegation clear as to the timing of these promises and then I don't see how the integration clause is relevant, temporally speaking.

THE COURT: Okay. Thank you.

MR. MEISTER: Thank you, Your Honor.

MR. McCARTHY: Good afternoon, Your Honor.

Ed McCarthy from Weil Gotshal, on behalf of LBHI, the lender, here.

I'll try not to repeat what was in the briefing already, Your Honor. It's clear you understand the issues here.

Needless to say, Lehman objects to the motion. It's procedurally improper, as we see it. There's nothing new to reconsider. There's no new facts. There's no new law that they've pointed to and it's substantively deficient. There's no --

THE COURT: Well, let me just break in on "no new facts."

MR. McCARTHY: Sure.

THE COURT: Mr. Meister's alternative relief to reconsideration is leave to amend the complaint presumably

for purposes of emphasizing the facts that were not adverted to in the second amended -- or the first amended complaint. This would be the second amended complaint if I were to approve that request.

And his focus is now there are multiple term sheets, some were presented before the execution of the $95 million dollar loan and at least one was presented subsequent to execution. So, to the extent that there's an integration clause issue that might otherwise bar a promissory estoppel claim, I still have the claim on account of this more recently crafted term sheet. So, the facts may be different based on that or at least there's a different emphasis on the same facts.

MR. McCARTHY: I would lean heavily towards the second, Your Honor.

THE COURT: Right.

MR. McCARTHY: These aren't new facts; they're simply not. And the notion that stressing the fact that this discussion regarding long-term financing, which my client has conceded throughout the course of this litigation, which has gone on for years -- and we would actually look at this amendment as probably the third considering they already changed their theory of the second-amended complaint -- of the first-amended complaint, dropping the repo claims. So, was that an amendment or was

it not?

In any case, when you look at those -- what they're claiming are new facts, it's truly irrelevant. This -- sure, the integration clause is dated in a finite agreement, the loan for the $95 million dollar loan. That loan was amended and extended twice. And in those extensions, which came at the Soffers' request, of course, all the terms of that $95 million dollar loan were extended as well. The parties thought about that. They were represented by counsel. We can't forget that these are very sophisticated parties. All the cases address that.

So, I would say that although it's not -- the notion that they can amend or perhaps stress these facts that the promisor -- the so-called promise was made after the first $95 million dollar loan, I would say that it's really irrelevant here because the timing of the original $95 million dollar loan isn't finite of itself. Because per the request, it was extended twice up until the very day that the Soffers filed suit, and they were the ones who brought this suit first, the day the loan came due.

So, I think any reasonableness -- and of course we're talking about reasonableness here -- how reasonable was it for the Soffers to rely on a supposed handshake deal that was going to be for over a half a billion dollars in a fully mortgaged sophisticated transaction, how reasonable

was that?

So when you look at whether a promise was made before or after the first $95 million dollar loan, you need to look at the big picture of what the case is saying here, Your Honor. And I think the fact that the loan was extended and it became another meeting of the minds of the parties here to extend it, extend all the original terms, shows that that integration clause -- you can't even put a finite term on that.

THE COURT: Let me ask you to comment on Mr. Meister's contention that the integration clause, no matter how you interpret the words "the subject matter hereof," is applicable to parties who are different from the parties who are alleging reliance on the proposed $625 million dollar advance.

MR. McCARTHY: I think the facts there may not have come out as accurate as I think they are where the actual -- the Turnberry parties are parties to the $95 million dollar loans. Because they were the mortgagors -- and I may be mistaken there -- but you have the Turnberry parties that hold the property, which was the collateral for the $95 million dollar loan. And that foreclosure was on-going and that's one of the first amendments that came up when they amended their complaint to bring up the repo claim to prevent that foreclosure.

So, I think those parties are a little bit closer to that $95 million dollar loan than maybe was put out there, but separately, we're not talking about enforcing a $95 million dollar contract. I mean we are, but that's why we want to focus on in this dispute, but with respect to looking at promissory estoppel, we're not talking about enforcing that promise.

We're saying in light of the integration clause that's there, how reasonable was it for these other parties, these sophisticated business parties, to rely on this supposed handshake deal?

So, I don't think they could ever make the argument with a straight face that the Turnberry entities weren't aware of the integration clause even if they weren't parties to the original loan agreement.

THE COURT: Yes, but here's the issue that's presented by Mr. Meister and I don't have the facts before me at the moment as to who signed what and to who knew what. He is, however, arguing that the integration clause, even if you were to construe it strictly would be construed against the parties to the $95 million dollar loan and would not preclude other related parties, even if they knew about it, from asserting a promissory estoppel claim.

What's your position with respect to that argument?

MR. McCARTHY: I think that is a far too granular reading of the integration clause and of the $95 million dollar loan. Again, we're not talking about small numbers, even with the $95 million dollar loan. We're talking about a loan that was fully collateralized and even per the terms of the integration clause, when you look at it, it's much broader than just saying it's a finite integration clause that only applies to the parties, whether it be Jack and Jeffrey Soffer -- Jacqueline and Jeffrey Soffer that signed the actual promissory note.

We're talking about a fully integrated, complex business transaction, even when you're looking at the $95 million dollar loan by itself.

And I think Your Honor was correct when you pointed to the final sentence of the integration clause which talks about "the subject matter hereof." And while we're looking at the subject matter hereof today, and for this case in general, we've been talking about this since the first complaint that was ever filed in this case, this being an interim loan, a loan that would be taken out.

So, when you're talking about this loan, how is it going to be taken out? It's going to be taken out by this supposed long-term financing. So, even when you're -- even if you look at it in a granular spirit, that this loan, in and of itself, when they were talking about it was called

the "take out loan" because it was going to be repaid, supposedly by this long-term loan.

That has been their theory and that's why it would be absolutely unreasonable for a party to think that the terms of this contract, that was, by their own allegations -- and we're not talking about someone just standing up in court -- we're talking about pleadings. We're talking about sworn statements, even from Brett Ersoft who says this was a loan that was going to be taken out by a long-term loan.

It would be absolutely unreasonable for a party to think that you could have a handshake deal in light of this integration clause that you could rely on and then go about your business as if the integration clause never existed.

I think you were also correct, though, that this case isn't just about an integration clause. The ruling -- the Motion to Dismiss ruling stands on its own. And I think the cases, Your Honor, cited, within that ruling which haven't been addressed, the Klineberg (ph) case, the Kelter (ph) case, those are controlling cases and they're spot on. They talk about promises made before and after contracts and whether it's reasonable to rely on those promises, and, of course, we know how those come out. They weren't even addressed in the briefing.

But, here, Your Honor was spot on that this

promissory estoppel claim fails even if the integration clause did not exist and there's several reasons for that.

One, procedurally, as we talked about, there's no new facts or new (indiscernible - 34:20) but substantively we're talking about -- the Courts that look at this, especially in the Second Circuit, look at the transaction as a whole. And what we're looking at here is more than a half a billion dollars in a complicated deal that they're saying was just reasonable to assume it was going to go forward when you had a handshake.

In light of this -- in light of the type of transaction it is, even if you didn't have an integration clause, you couldn't have promissory estoppel here.

If Your Honor allows them to amend, we will be right back here. Not on a motion for summary judgment; we'll be here on a motion for dismiss if Your Honor allows it first, because they cannot meet the bare bone elements of promissory estoppel, which is clear in the Second Circuit. You need an unambiguous promise, you need that reasonable reliance, and you need a particularized injury, and they can't meet any of those three prongs.

When you're talking -- this is especially true when you have a contract that would otherwise be barred by the statute of frauds. And this is precisely that type of contract. You have a contract here for a long-term

construction loan, again, for over a half a billion dollars. It's barred by the statute of frauds because both it could never have been completed in a year, even by its own terms, and even if you exclude that, it's a contract that concerns real property. This was going to be fully mortgaged.

So, when Courts look at using promissory estoppel to get around a statute -- a claim that's otherwise barred by the statute of frauds, it requires an unconscionable injury, a particularized unconscionable injury.

And the cases are very clear. The Klineberg case actually cites to this and talking about an unconscionable injury in the case Your Honor cited. But there's other cases as well and they talk about lost profits, lost business opportunities, damages that kind of flowed from the expected promise. Those are simply not the unconscionable injuries that could ever survive under a promissory estoppel claim when you have statute of fraud otherwise applying. And that's taken apart, moving aside from the integration clause.

Even if the integration clause wasn't applicable, which of course it is, and we think that's the easy and correct way to dismiss this -- even if it wasn't there -- you have grounds -- more than enough grounds to get away with this claim on a Motion to Dismiss.

So, the integration clause is there. It certainly

strengthens our analysis, but the integration clause isn't the only writing that strengthens our analysis. The term sheets, which have been brought up here today, those are made clear by their own terms that this is a non-final term sheet and needs to be executed, as any term sheet for a large construction loan does.

This isn't -- when Your Honor's presented with this evidence, if it ever comes before you, these aren't going to be surprising term sheets to you. You've seen deals that have been negotiated like this.

So, what they're talking about now is that it was reasonable to rely and rule upon this. That flies in the face of both the integration clause and the terms sheets because those term sheets say this isn't a final promise.

In light of that, when you're looking at a type of oral promise that flies in the face of prior written agreements, Courts will simply will not enforce the promissory estoppel claim.

THE COURT: There is an element that Mr. Meister emphasized in reading the S draft declaration, which is the (indiscernible - 37:26) practice between the parties in reference to financing transactions, that -- and I'm not dignifying the argument, I'm just restating it -- that give the borrower an added sense of comfort in relying upon not fully documented commitments from future financing.

Because what I think Mr. Meister is saying -- and I'm not trying to be his spokesperson here, I'm simply trying to engage in a conversation -- I think he's saying because of the history in the course of dealings between the parties, in a setting in which it might not have been reasonable for a stranger to rely, it might have been reasonable for these borrowers to rely, notwithstanding the legends that were printed on the term sheets, because in the past, at least, these negotiations always resulted in consummated financings. I think that's what he's saying.

Given that, do you give any credit to that course of dealing argument for purposes of the promissory estoppel claim that he wishes to preserve?

MR. McCARTHY: I don't, Your Honor, and I can't, in light of the full Ersoft affidavit and in the light of everything else I've seen in this case. The Brett Ersoft affidavit talks about, yes, the course of dealing with these parties and the fact that Mr. Ersoft who had a strong relationship as the face man for Lehman when he was there with the Soffers. And as Your Honor said at one point in this litigation before, I'm sure those parties did shake hands throughout the course of their dealings, but what the Ersoft affidavit says is that there was never a promise that Lehman made in the past that didn't come to fruition in a final written agreement. That's what he's talking about.

He's not saying that we made handshake deals in the past and we just went ahead and loaned them $600 million dollars without ever finalizing something in writing. That's not what Mr. Ersoft says in his affidavit; that's simply not true.

And then when you look at the rest of the Ersoft affidavit, he goes right back to what the prior allegations were and prior sworn statements of a lot of people in this courtroom, that this was a take out loan. That these transactions were very similar. That's been their allegation. That's been their theory. And they have a sworn affidavit from Mr. Ersoft that this was supposed to be a take out loan.

So, it ties you right back to that integration clause and whether or not it was reasonable for any of these parties to rely on oral promises when you have a fully written agreement that has an integration clause and you have a history of dealing, a long history of dealing where every other contract has been put in writing.

Even smaller contracts, this smaller, $95 million dollar loan is put in writing. That's what Mr. Ersoft is talking about. He's not talking about a history, of course, of dealing with oral promises.

THE COURT: Okay.

MR. McCARTHY: Your Honor, I think a better

analysis here, other than -- Mr. Meister used a couple creative analyses to talk about what was really happening here in this case.

What's really happening here is you're talking about a party saying they agree with the Court that it was improper, unreasonable for them to rely on a promise, to enter into a $95 million dollar loan, but then they're saying it was reasonable for the very same party, very same group of entities to rely on that exact same promise to do something else.

If you want to take a simple transaction, I think the proper analysis would be if you have a seller and a buyer of goods. You could have someone on the street selling, for instance, bicycles, and you tell the buyer, this bicycle is going to really work great for you.

But the buyer looks at the bicycle and they can see it's not a very good functioning bike. It's got flat tires and it's not going to be a good bike. And then that buyer comes to this Court and says, Your Honor, well it might not have been smart or reasonable for me to rely on his statement to buy that bike, which I did, but it was reasonable for me to stop negotiating with other sellers of bikes.

And that's what they're saying here. They're saying, Well, I shouldn't have relied on that promise to

enter into the $95 million dollar loan. They've now conceded that point. They said in light of the integration clause, that was unreasonable. It was reasonable for me to stop negotiating with other lenders to go and get another loan add that's not -- Courts don't look at your actions and what you did to determine whether it was reasonable.

The first focus is on the substance of the promise. Was there any -- was it reasonable to rely on the substance of that promise? And here we're talking about an oral promise, a supposedly oral promise -- of course we refute that that oral promise was ever made -- but they're talking about relying on an oral promise to enter into a transaction with multiple parties for millions and millions of dollars in a complicated deal that was going to be collateralized by property.

It's absolutely unreasonable, any way you take it, for them to have relied on this promise and stop negotiated with other lenders.

THE COURT: Well, that may be, but we're dealing with a 12(b)(6) motion, not a motion for summary judgment or a trial on -- that goes to judgment. And part of what Mr. Meister is doing here is looking for another bite of this from a slightly different angle. He seems to be saying it's true that I previously that this was in a sense a fully integrated transaction in which the $625 million dollars in

take out financing was tied to the $95 million dollar loan and my clients relied upon the availability of the $625 million dollar loan in entering into the $95 million dollar loan, which also includes the integration clause.

But he's spinning it differently today and he spins it differently toward the end of his Motion for Reconsideration. He's basically saying I want a do-over in my ability to show that there are certain promises that either do or do not give rise to cognizable promissory estoppel claims that were made following execution of the $95 million dollar loan. And on that basis alone, I want the ability to go through discovery and if I'm knocked out at the summary judgment stage, maybe then I'll complain then, too, but at least I'll have my ability to deal with this later and not at the pleading stage. That's what I hear him telling me today.

What's your response to that?

MR. McCARTHY: My response to that, Your Honor, is 12(b)(6) serves a very specific purpose and that is to prevent parties from having to go through a boondoggle of discovery when there's absolutely no support at all for their claim, and that's what we have here.

And I think when you look at this case, which, of course, started in February of 2009 -- this isn't a new case -- and you look at the history of what's happened here,

you backtrack a bit, you can really see what's going on. This isn't about buying some extra time for a promissory estoppel claim or about the substance of their claim, because there is none. It's about delay and we get that.

This isn't a targeted motion. This is about buying time again, so they can bring back in a full new theory of their case that's not targeted when you look at what's going to happen. It's a strategic decision they've made -- a defense decision -- it gets made all the time, and it's a game of delay here. To delay paying the creditor who has a written contract and that deserves repayment.

And it's not just here. There are other cases out there. We've seen that in diligence. We've seen that in discussions. There are numerous other creditors; it's nothing new.

But considering where we've been in this case -- and I'll trace it for just a moment -- the time of delay needs to come to an end now. As we were here last time, we talked a little bit about how the harm to my client -- harm to Lehman has now become imminent. Other cases are moving forward. Other cases are -- there's a concern that there could be other judgments against the Soffers and Lehman now deserves a chance after more than two years of litigation to try and get in line to streamline this case and try to get in line with the other creditors and see what is really the

issue here, which is, is there a chance to collect, and if so, how much can you collect? That's what this is really going to come down to and we understand that, and we're trying to push the litigation in a streamlined manner so we can get there.

Now, Your Honor mentioned this already a little bit, but this isn't the first time they've had an opportunity to do a redo. In February of 2009 they brought this case the first time. Their argument then was breach of contract because the supposed take out loan was intertwined with the long-term handshake deal and that was their original claim.

Two years later, approximately, when they wanted to prevent a foreclosure, they asked for a redo and they asked for our consent for that redo and they came to court and asked for consent. We understood that consent was coming with a -- in agreement -- at least in my memory it was that that would be the last redo, obviously it wasn't. We allowed that claim to go forward and Your Honor listened to our hearing and was very gracious in the time you granted us listening to the dismissal only to send us back to mediation so that we could try and settle this thing and see what was really there.

That had some months in delay. I won't get into the substance of the mediation, Your Honor, but certainly it

did not resolve these disputes. We came back before the Court and we asked -- we were here, again, and we saw another redo, where, for the first time we heard when we were sitting at this table -- it was the first time that you heard it as well -- that their theory of fraud based on repo is no longer their theory.

And now they want to rely on this promissory estoppel claim -- or at least the first promissory estoppel claim. And so we went back to mediation, again, but, yet, fruitless again and more months go by. More months go by and we have to come back and I had to ask Your Honor to rule on the motion and, you know, this Court did exactly as it said it was going to do and ruled with a very thoughtful opinion and you told the parties to focus on the substance of the claim.

We went back thinking we would do this, instead we have this motion and now they're asking for a total another redo, a totally new theory, and this would prejudice my client.

They're seeking full discovery in all of this -- we're not trying to bar discovery. We're actually being very (indiscernible - 47:39) in the documents that we're turning over. We've had numerous conversations about this. But as we see it, the only things that is driving this litigation at this point is that my client has had to take a

bullish position and we have to in negotiations in saying delays can no longer happen.

We've had some delays in discovery that we've had to bring up. We've had even delays in some substance. Recently, we had about a week-long delay where we thought we were going to have to be here asking for a default because there wasn't an answer to our counterclaims. We had to make hard decisions, internally, about whether we bring those forward to the Court for decisions or whether we try to focus on the substance of these claims.

And instead we've chosen to focus on the substance of the claims. And the substance here, are the undisputed facts. You have sophisticated parties, sophisticated entities that are listed on these pleadings. They negotiated a contract, a final written contract for $95 million dollars. Pen was put to paper and it was negotiated with well-paid, well-regarded counsel of everybody's own choosing.

Those are the facts. That's the undisputed facts of this case and that's what we want to focus on. We're not trying to prevent people from seeking other evidence that might be tangentially related, but if we allow this claim back in after everywhere we've already been, it will be a complete boondoggle and we'll be starting from square one, because we will move to dismiss that claim.

Whether -- if the Court allows it -- whether on a Motion to Dismiss or summary judgment because there is absolutely no foundation for the claim as we see it, Court's routinely dismiss promissory estoppel claims on a Motion to Dismiss exactly for this reason and there's numerous courts in this district in this circuit.

THE COURT: Okay. Before giving Mr. Meister an opportunity to respond, I have a question that really applies to both of you, not directly relating to the argument, but stimulated by the argument.

One of the reasons the Motion to Dismiss was decided when it was is that I received an unsolicited telephone call in August from the mediator who was handling your mediation discussions. It's the first time in my experience that a mediator has ever contacted me in connection with a matter on my docket and, frankly, it's the first time, to my knowledge, a mediator has ever contacted a Court directly. It's just not done.

And what I was told was that it might well expedite a resolution of the business issues between the parties if the Court were to, without delay, decide the pending Motion to Dismiss.

Immediately before the hearing, in connection with my rendering of a ruling on the Motion to Dismiss, you and your colleagues filed a status report that indicated that

the mediation had failed, that it was futile to continue the discussions and that -- and I'm paraphrasing -- regardless of the outcome of the Motion to Dismiss, mediation was no longer something that Lehman was prepared to engage in because it was no longer productive. That's my paraphrase of what I recall.

My question today is this: Apparently, the parties having involved in efforts to move forward with document discovery. Mr. Mister has referenced the fact that there might be some depositions in the early months of 2013. I have no idea where your overall discovery schedule will take you. But this is a time consuming and expensive process. Your stated goal, which is to get on with some kind of judgment against your Defendants, so you can get in line is not necessarily consistent with your stated strategy, which is to litigate, because litigation is time consuming and expensive and fraught with risk and uncertainty, including appeal risk, and any appeal, undoubtedly will add even more time to your timeline, presumably to the estate's detriment.

With that preamble, my question is: Why are you gentlemen not proceeding back to the mediation table? Because it seems to me that you are very familiar with the circumstances. You are certainly able to address the potential outcome of the issues, whether or not the

complaint is ever amended. And it seems to me that everybody is wasting time here in litigation.

Question to Lehman: Do you persist in the views stated in your filed report that mediation is simply something you're no longer prepared to consider?

MR. McCARTHY: Your Honor, I don't want to clarify what our report says --

THE COURT: It says what it says.

MR. McCARTHY: Exactly. Exactly, Your Honor.

Lehman's position is that's its ears are open and it certainly views this as a case that could be settled, and the type of case as many other cases as my co-counsel with Weil and other counsel have been here before Lehman have settled cases with you. Our position in this particular case, and in call cases, is that it takes two to settle.

And when we viewed the prior mediations -- and they were extensive; both parties were there for numerous hours with representatives -- we looked at what happened there and we said at this point in time we need to cut it off because those particular mediation attempts, those settlement attempts were not getting anywhere. The parties were at a stalemate for so long with us viewing -- and this is our view -- with nothing meaningful on the table.

And so that's why we told Your Honor at is that point in time that the efforts were futile. Now, I thought

Your Honor might ask you about this and I certainly wanted to give you an update on it and so I did ask my client whether there have been any new updates, whether any parties have changed their position based on the recent rulings or not so recent rulings anymore, but based on the recent occurrences and your instructions, which I think have been clear throughout the course of this case to try to continue to see if we can make this happen and there hasn't been any new change in position, based on what I've been told.

Our ears are open and we are ready to listen if there is an offer on the table. And they continue to be open, but this type of case, where we've had these efforts before, where we've been with a mediator before, who used a lot of different techniques to try and bring us together -- and simply there was no ground being made.

I think it would be futile again to send us back to mediation. We are hopeful that there is an offer or something that comes across the table at some discussion point that would tie us back into having a meaningful settlement discussion, but at this point, I would have to stand by our statement, which was sending us back to mediation would be futile because we've seen what happened there and we had -- from our view, at least -- no reason to believe that there was going to be any change in position which would allow Lehman to settle in good faith.

So, I think at this point, Your Honor, absolutely, our ears are open, but we view this as a type of case where a streamlined litigation, one where 12(b)(6) motions have already been briefed extensively, argued extensively, and ruled on thoughtfully, the case should move forward in a streamlined fashion.

If there comes a time down the road or it makes sense to cut off the well, cut off the spigot, so that the parties can conserve some costs and try to really meaningful settle, we won't hesitate to get back here, Your Honor, and tell Your Honor that and ask to take a reprieve from the schedule.

But at this point, we don't see any reason to do that and it would just be more delay. And more delay to the pardon me of my client.

THE COURT: Okay. Thank you.

MR. McCARTHY: Thank you, Your Honor.

THE COURT: Mr. Meister?

MR. MEISTER: Thank you, Your Honor.

I'll be brief.

Let me proceed sort of backwards starting with the discovery and mediation issues. With respect to discovery, I believe what happened was that the electronic search terms were agreed to a long time ago before Your Honor entered a decision dismissing claims, and, therefore, those search

terms were fashioned in a manner where they were designed to pick up the term sheets related to the $625 million dollar take out and those documents have already been isolated on both sides.

So, it is simply not true that there is any delay or dilatory aspect to this at all. I believe, certainly on our side, and I believe, for the reasons I just articulated on the Lehman side, there wouldn't be a second of delay. There would simply be captured into the discovery documents already isolated over the past several months by search terms that were designed before the decision when this claim was in the case. And the depositions are not going to change -- at least the persons deposed won't change.

So, there's no delay associated with the request to amend the claim or the request to reverse the decision, based on the reasons I articulated.

In addition, I think -- let's think together for a moment about what happens in the absence of that. If you were to deny all the relief that we have requested, I suppose I would ask the Court under 8003, I believe it is. It's essentially for permission to appeal a non-final order. I don't know whether, of course, the Court would grant that. I think I might have to actually ask the District Court as well.

If I was denied that relief, I would likely be

forced to appeal it when I could appeal it when it became final because, Your Honor, if the situation doesn't change and all the claims that Lehman has on its loans are one without any offsets by my clients -- on my client's behalf -- it is of a magnitude that would annihilate my clients, which is why you may recall the negotiations and the mediation were very difficult and trying because they kind of took the form of a virtual bankruptcy discussion of my clients.

So, I think what we're headed for in the absence of some relief here is my clients or another bankruptcy trustee or a debtor in possession or in some form or another seeking an appeal here. And if, after all this discovery is concluded, and we cut short the discovery on the $625 million take out, it would be very inefficient in my view.

I want to turn to one sentence, Your Honor, in the Ersoft affidavit because I think counsel was not accurate in his characterization. The one sentence reads -- it's in paragraph two of the declaration, quote, "The relationship with these clients and others like them was such that Lehman and Turnberry would quickly agree to the terms of financing on an oral and formal basis and documents would be prepared later" closed quote.

So, Ersoft does plainly say that there was this course of dealing. Of course they can refute it, but the

Ersoft does say that and I think that does lend significance credence to our client that it was reasonable for us to rely and that corresponding with it was foreseeable on Lehman's part to expect our reliance.

Counsel had made the comment that somehow Turnberry/Centra Sub was a party to the loan agreement. That's not true, Your Honor. I have the loan agreement in front of me. It is in the record. There are three parties to the loan agreement: Lehman Brothers Holdings, Inc., Jeffrey Soffer, and Jacqueline Soffer. It's on the first page of at the document.

There are some other parties that consent to it, but it's not Lehman, Turnberry/Centra Sub the promisee of the $625 million dollar take out.

In addition, there was some loose talk sort of assuming that there was caveats, for lack of a better term or conditions, in the $625 million dollar term sheets that made them non-binding.

The first instance, I want to point out -- and if I'm wrong, counsel will correct me -- but to my knowledge, those term sheets are not been the Court. The $95 million dollar loan agreement, of course, is before the Court, but the term sheets are not been the Court.

Second of all, it's not true. The term sheet says, "Lender's obligation to make the loan for borrower

shall be subject to lender's review and approval of the items on Schedule A."

So, that sounds more to me like a conditionally binding agreement. If -- whatever the conditions are in schedule A, which I didn't go back and study -- then, they are bound.

But I think the important point here is this is not a summary judgment motion; it's a 12(b)(6) motion and those documents are not in front of the Court.

I want to remind the Court respectfully, again, that the yes, it is true, Your Honor, that I am asking the Court in the alternative to allow me to amend, to plead, and after a post-$95 million dollar loan execution, a statement of the $625 million dollar take out commitment.

By the way, these are not oral promises; they are written promises. Whether they're binding writings is a separate matter, but they are certainly written. I have them on my desk right now.

But I do want to be clear that while we are definitely asking for that relief and while we can't see how the integration clause could possibly be involved with those statements because they are subsequent to, not prior to the $95 million dollar loan agreement, we are also alternatively saying both, one, that the $95 million dollar loan agreement is a document to which the Plaintiff on this claim is not a

party and that is just erroneous to use the integration clause to bar a claim to a non-party -- asserted by a non-party and that it isn't the subject matter.

It's very clear to me, Your Honor, that the words "subject matter" mean the loan, and the loan is the $95 million dollar loan.

I don't think any reasonable person would -- signing that $95 million dollar loan would think it means that it vitiates the $625 million dollars take out commitment.

And I want to take exception to counsel's characterization of our position. I am not saying that in this motion that it was unreasonable for us to rely on the $625 million dollar take out for purposes of the $95 million dollar loan, but it was reasonable for us to forego discussions with other lenders. What I'm saying is, yes, we believe the 625 million was true, based on the course of conduct described in the Ersoft declaration. We relied on it when we enter into the $95 million dollar loan and we relied on it when we discontinued conversations with the Bank of America, Merrill Lynch, and Goldman Sachs, all of whom had made written offers to finance the shopping center. And if we had gone with any of them, my clients would own that shopping center today.

What we are saying is that the integration clause

bars the Soffers from arguing that they don't have an obligation to repay the $95 million dollars, but it does not bar Turnberry/Centra Sub from making a claim on a promissory estoppel basis that it suffered damages, in the form of lost equity, by relying on the $625 million dollar promise and that it was inappropriate -- it was particularly inappropriate, we respectfully submit, on a 12(b)(6) Motion to Dismiss that claim.

Your Honor, my -- I was pretty deeply involved in the negotiations that took place in the mediation. I have not been involved since the mediation formally ended. My understanding is that there have been conversations between principals of my client and principals of Lehman or perhaps the trustee. I am not privy to those conversations. I don't know exactly where they have left off, but we are more than happy to go back to mediation.

We tried very hard -- obviously I'm not going to get into the substance, but I do want to assure the Court that there were substantive discussions and meaningful substantive offers. It was a very difficult negotiation and we're happy to go back.

But I don't want that to be misconstrued by my adversary. I'm not looking to delay these proceedings. This motion is targeted, contrary to what counsel says. It will not delay discovery. We are not looking to slow the

case down. If Lehman is willing to go back to mediation, we want to settle the case and we want to litigate the case, professionally and efficiently.

We think that, frankly, leaving things where they stand is an inefficient way for the reasons I previously said. And what I see on the horizon in the event that things -- the discovery is not opened or is closed to this issue, I just think it's an inefficient way to proceed because ultimately, it's such a massive matter from the perspective of my client that I see it involving leaving no stone unturned -- for lack of a better expression.

And if a District Court on appeal were to agree with my analysis, it would be a shame years from now, literally, this then go back to the discovery. It seems to be much more practical to -- since all the discovery has been done on the search terms, to, at a minimum, allow us to amend, get those documents out and include them in the examinations before trial, and, frankly, I don't think there should be another Motion to Dismiss. I think we should get some evidence before the Court.

Thank you very much, Your Honor.

THE COURT: Do you have anything more?

MR. McCARTHY: I just want to clarify a point on production and this might just be a miscommunication, but I think as Mr. (indiscernible - 1:08:04) and I have discussed

regarding discovery a bit, those search terms were run on the documents regarding the supposed long-term financing. We are not preventing -- we are not holding those back because it would be almost too costly to rereview all of them. We see nothing in there that would want us to prevent from holding them back. My point on delay -- so they will see those docs and if they want to bring them before the Court for whatever reason, they certainly can.

But my point on delay, Your Honor, is the exact reason a Motion for Reconsideration requires a demanding standard. We're not here on a 12(b)(6) anymore. We're here on a motion to reconsider a ruling that the Court already made.

The point on delay is even if they get those documents, if they're able to amend or able to keep their claim back in, we would be rearguing, rebriefing, reinvestigating something that already happened. And that's why a motion to reconsider requires such a demanding standard; one they have not met here.

And that's why I want to leave the Court pointing to the fact that we're not looking at 12(b)(6) again. We're looking at whether you should reconsider. And that's what allows us to look beyond what we talked about in 12(b)(6) and look into if these claims do survive, what's going to happen with these claims?

And the Court is allowed to look at the claims and see whether they will survive or won't. Is there any futility in letting a claim survive and we are -- we're telling the Court that there absolutely is. This type of promissory estoppel claim that they're now alleging requires a particularized unconscionable injury. It's one they simply cannot allege. It's one they haven't even tried to allege. That comes from a case called 720 Lex Acquisition, which is 2011 West Law 5039780, Southern District of New York, and another one, Darby Trading 568 F Supp.2d 329, Southern District of New York, 2008.

Cases like this required an injury is separate and apart from what you would have expected if the promise was actually made. All they're saying is they lost the opportunity to get another lender. That is exactly -- that is a lost business opportunity, one that is strictly forbidden under the law.

And also, we're allowed to look up how did -- what are those damages? What are they going to prove up?

These damages are entirely too speculative. We've had it in our briefing before. They're going to prove that they would have been able to get another loan from another lender. That loan would have been on terms that would have been great for them. It would have saved their project. It would have made it so they wouldn't have gone through with a

foreclosure that's already happened.

I mean how many ifs are we going to go down once this claim is -- if it's allowed back in -- and that's what -- on reconsideration, Your Honor, you are allowed to look at that and we should to see if it's futile to let this claim back in.

Nothing else, Your Honor. Thank you.

THE COURT: Okay. Thank you.

I'm going to take this under advisement. The parties are encouraged to return to mediation between now and the end of the year. I'm not ordering it. I think that this case has many twists and turns to it.

The damages, as noted are speculative on these claims. These claims are of highly questionable value even if they are part of the compliant, but I believe that the mediation that I'm encouraging should at least assume the possibility that these claims may be reinstated at some point, either through amendments to the complaint or possible reconsideration of the 12(b)(6) dismissal.

I say that because I only think it appropriate to level the playing field, somewhat, for purposes of conversations that may take place.

The waste associated with this litigation is manifest and should be factored into your consideration as to whether proceeding promptly with some additional

mediation sessions may be sensible.

I hope to have a decision before the end of the year either way. We're adjourned.

MR. McCARTHY: Thank you, Your Honor.

(Proceedings concluded at 3:30 PM)

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C E R T I F I C A T I O N

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: November 17, 2012

Sheila Orms

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